(16,237.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 147.

THE DEL MONTE MINING AND MILLING COMPANY, APPELLANT,

vs.

THE LAST CHANCE MINING AND MILLING COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 18, 1897.

1 In the Supreme Court of the United States.

THE DEL MONTE MINING AND MILLING COMPANY, Appellant,
vs.
THE LAST CHANCE MINING AND MILLING COMPANY, Appellee.

On a certificate from the United States circuit court of appeals for the eighth circuit.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this ninth day of March, A. D. 1896, hereby certifies that upon the record on file in said court in the cause wherein The Del Monte Mining and Milling Company is appellant and The Last Chance Mining and Milling Company is appellee, and which cause is now pending before this court upon appeal from the circuit court of the United States for the district of Colorado, the following facts are made to appear:

That the appellant is the owner in fee of the Del Monte Lode mining claim, located in the Sunnyside mining district, Mineral county, Colorado, for which it holds Government patent bearing date February 3rd, 1894, pursuant to an entry thereof made at the Del Norte land office on February 27th, 1893.

Said patent is in words and figures as follows:

General Land Office No., 23885. Mineral certificate No. 286.

THE UNITED STATES OF AMERICA.

To all — whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legis-
2 lation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate No. 286, of the register of the land office at Del Norte in the State of Colorado, accompanied by other evidence whereby it appears that the Del Monte Mining and Milling Company did, on the twenty-seventh day of February, A. D. 1893, duly enter and pay for that certain mining claim or premises, known as the Aspen and Del Monte Lode mining claims designated by the surveyor general as lot No. 7356, embracing a portion of sections thirteen, fourteen and twenty-four, in township forty-two north of range one west, New Mexico meridian in the Sunnyside mining district, in the county of Hinsdale and State of Colorado, in the district of lands subject to sale at Del Norte and bounded, described, and platted as follows, with magnetic variation fifteen degrees and thirty minutes east.

Beginning for the description of the Aspen Lode claim at corner No. 1, a spruce post five inches square marked 1+7356, with mound of stone from which U. S. locating monument No. 7333 bears north one degree, twelve minutes and thirty seconds east one thousand seven hundred and fifty-one and six-tenths feet distant; the west

quarter corner of section twenty-four in township forty-two north range one west, New Mexico meridian, bears south thirteen degrees and ten minutes west two thousand one hundred and eighty-six and three-tenths feet distant; a spruce tree ten inches in diameter blazed and marked B. T. 1 + 7356 bears north thirteen degrees and fifteen minutes west sixteen feet distant, and a spruce tree nine inches in diameter blazed and marked B. T. 1+7356 bears north five degrees and forty-five minutes west twenty-one and five-tenths feet distant.

Thence, first course, north fifty-nine degrees and forty minutes east one hundred and fifty feet to a point from which discovery shaft bears north thirty degrees west eight hundred and ten feet distant; three hundred feet to corner No. 2.

Thence, second course, north thirty degrees and five minutes west one thousand four hundred and ninety-two and three-tenths feet to corner No. 3.

Thence, third course, south fifty-nine degrees and forty minutes west two hundred and ninety-eight feet to corner No. 4.

Thence, fourth course, south thirty degrees east one thousand four hundred and -inety-two and thirty-five hundredths feet to corner No. 1 the place of beginning; the survey of the lode as above described extending one thousand four hundred and ninety-two and two-tenths feet in length along said Aspen vein or lode.

Beginning for the description of the Del Monte Lode claim at corner No. 5, a spruce post five inches square marked 2–5 + 7356, with mound of stone, being also corner No. 2 of said Aspen Lode claim, from which corner No. 3 of survey No. 7263 A. the Last Chance Lode claim, bears north fifty-three minutes west two hundred and fifty-one and fifty-four hundredths feet distant; corner No. 9 of survey No. 7296, the Forest King Lode mining claim bears north sixty-four degrees and seventeen minutes east one hundred and twenty-eight and six-hundredths feet distant; a spruce tree nine inches in diameter blazed and marked B. T. 2–5 + 7365 bears north seventy-one degrees east twenty-eight and one-tenth feet distant; a spruce tree twelve inches in diameter blazed and marked B. T. 2–5 + 7365 bears north eighteen degrees and forty-five minutes east twenty-seven and nine-tenths feet distant, and the discovery shaft bears north seventeen degrees and fifty-one minutes west eight hundred and eleven and two-tenths feet distant.

3 Thence, first course, north fifty-nine degrees and forty minutes east two hundred and twenty-four and twenty-seven hundredths feet intersect line 3–4 of survey No. 7406, the New York Lode claim at south thirty-three degrees and forty-two minutes east one thousand and ninety-three and thirty-eight hundredths feet from corner No. 3; two hundred and ninety-seven and six-tenths feet to corner No. 6.

Thence, second course, north thirty degrees and twenty-two minutes west one hundred and fifty-three feet intersect line 2–3 of said survey No. 7263 A. at north eighty degrees and twenty-five minutes east one hundred and eighty-six feet from corner No. 3; six hundred and eighty-nine and eight-tenths feet intersect line 3–4 of said survey No. 7263 A. at north ten degrees and four minutes west five

hundred and one and seven-tenths feet from corner No. 3; one thousand and eighty-nine and seventy-two hundredths feet intersect line 2–3 of said survey No. 7406 at north sixty degrees and twenty-six minutes east one hundred and thirty-six and ninety-two hundredths feet from corner No. 3; one thousand four hundred and ninety-two and two-tenths feet to corner No. 7.

Thence, third course, south fifty-nine degrees and forty minutes west two hundred and ninety and fourteen-hundredths feet to corner No. 8, being also corner No. 3 of said Aspen Lode claim.

Thence, fourth course, south thirty degrees and five minutes east one thousand four hundred and ninety-two and three-tenths feet to corner No. 5, the place of beginning, the survey of the lode as above described extending one thousand four hundred and ninety-two and two-tenths feet in length along said Del Monte vein or lode, expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claim or survey No. 7263 A. and that portion of said survey No. 7406 which is described as follows: Beginning at the point of intersection of line 2–3 of said survey No. 7263 A with line 3–4 of said survey No. 7406 at north eighty degrees and twenty-five minutes east ninety-six and twenty-four hundredths feet from corner No. 3 of said survey No. 7263 A. and at south thirty-three degrees and forty-two minutes east nine hundred and eight and forty-four hundredths feet from corner No. 3 of said survey No. 7406; thence north thirty-three degrees and forty-two minutes west two hundred and thirty-nine and eighty-nine hundredths feet; thence, north ten degrees and four minutes west two hundred and eighty-two and seventy-seven hundredths feet; thence south thirty degrees and twenty-two minutes east five hundred and thirty-six and eight-tenths feet; thence south eighty degrees and twenty-five minutes west eighty-nine and seventy-six hundredths feet to the place of beginning; and also all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground, the granted premises in said lot No. 7356 containing nineteen acres and twenty-five hundredths of an acre of land, more or less.

Now know ye, that there is therefore hereby granted by the United States unto the said The Del Monte Mining & Milling Company, and to its successors and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Aspen and Del Monte vein, lodes or ledges and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 7356
4 extended downward vertically, although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises: Provided, that the right of possession to such outside parts of said veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. 7356, so continued in their own direction that such planes will intersect such exterior parts of said veins,

lodes, or ledges: And provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to its successors and assigns forever; subject nevertheless to the above- mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to complete its development.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the third day of February, in the year of our Lord one thousand, eight hundred and ninety-four, and of the Independence of the United States the one hundred and eighteenth.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
[SEAL.] L. Q. C. LAMAR,
Recorder of the General Land Office.

The appellee is the owner of the Last Chance Lode mining claim under a patent dated July 5th, 1894, based upon an entry of March 1st, 1894, in the Del Norte land office, which is in words and figures as follows:

5 General Land Office No., 24532. Mineral certificate No. 324.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes

of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate, No. 324, of the register of the land office at Del Norte, in the State of Colorado, accompanied by other evidence whereby it appears that Ralph Granger, Erich von Buddenbrock and Theodore Reininger did, on the first day of March, A. D. 1894, duly enter and pay for that certain mining claim or premises, known as the Last Chance Lode mining claim, designated by the surveyor general as lot No. 726 A, embracing a portion of sections thirteen and twenty-four, in township forty-two north, of range one west, New Mexico meridian, in the Sunnyside mining district, in the county of Mineral and State of Colorado, in the district of lands subject to sale at Del Norte, and bounded, described and platted as follows, with magnetic variation fifteen degrees and thirty minutes east:

Beginning at corner No. 1, a spruce post four inches square, marked 1/7263 A, with mound of stones, from which the west quarter corner of section twenty-four, in township forty-two north, of range one west, New Mexico meridian, bears south, twelve degrees and five minutes west, three thousand nine hundred and twenty-seven and eight-tenths feet distant; U. S. locating monument No. 7333 bears north, eighty-one degrees and fifty-five minutes west, two hundred and eighty-eight and seven-tenths feet distant; a spruce fourteen inches in diameter, blazed and marked B. T. 1/7263 A, bears south thirty-six degrees and forty-five minutes west, thirty-eight and eight-tenths feet distant; a spruce ten inches in diameter blazed and marked B. T. 1/7263 A, bears south one degree and thirty-five minutes east fifty-three and seven-tenths feet distant, and the face of discovery cut bears south five degrees and twenty-five minutes west five hundred and forty-nine feet distant.

Thence, first course, south ten degrees and ten minutes east, one thousand and seventy-six and sixty-four hundredths feet intersect line 1/2 of survey No. 7406, the New York Lode claim; one thousand, two hundred and seventy-eight and six-tenths feet to corner No. 2.

Thence, second course, south eighty degrees and twenty-eight minutes west, two hundred and one and fifty-four hundredths feet intersect line 3/4 of said survey No. 7406; two hundred and ninety-seven and seven-tenths feet to corner No. 3.

Thence, third course, north ten degrees and four minutes west two hundred and eighteen and three-hundredths feet intersect line 3/4 of said survey No. 7406; eight hundred and seventy-nine and seventy-seven hundredths feet intersect line 1/2 of said survey No. 7406; one thousand two hundred and seventy-eight and thirty-four hundredths feet to corner No. 4.

Thence, fourth course, north eighty degrees and twenty-eight minutes east two hundred and ninety-five and six-tenths feet to corner No. 1, the place of beginning; expressly excepting and excluding from these presents all that portion of the ground, hereinbefore described, embraced in said mining claim or survey No. 7406

and also all that portion of said Last Chance vein or lode and
6 of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground; said lot No. 7263 A., extending one thousand two hundred and seventy-eight and thirty-four hundredths feet in length along said Last Chance vein or lode, the granted premises in said lot containing five acres and twenty-five hundredths of an acre of land, more or less.

Now know ye, that there is therefore hereby granted by the United States unto the said Ralph Granger, Erich von Buddenbrock and Theodore Reininger, and to their heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Last Chance vein, lode or ledge, and of all other veins, lodes and ledges, throughout their entire depth, the tops and apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 7263 A, extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. 7263 A, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; and provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantees above named, and to their heirs and assigns forever; subject nevertheless to the above-mentioned and the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and *and* the seal of the General Land Office to be hereunto affixed. Given under my hand at the city of Washington the fifth day of July, in the year of our Lord one thousand, eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

By the President:

[SEAL.] GROVER CLEVELAND,
By M. McKEAN, *Secretary.*

L. Q. C. LAMAR,
Recorder of the General Land Office.

7 The New York Lode mining claim, which is not owned by either of the parties, but was, as originally located, in conflict as to its surface area with both, was patented on the 5th day of April, 1894, upon an entry of the 26th of August, 1893, taking all of the ground in conflict between it and the Last Chance.

The patent to said lode is as follows:

General Land Office No., 24151. Mineral certificate No. 297.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate, No. 297, of the register of the land office at Del Norte, in the State of Colorado, accompanied by other evidence whereby it appears that A. L. Shear did, on the twenty-sixth day of August, A. D. 1893, duly enter and pay for that certain mining claim or premises, known as the New York Lode mining claim designated by the surveyor general as lot No. 7406, embracing a portion of sections thirteen and twenty-four, in township forty-two north, of range one west, New Mexico meridian, in the Sunnyside mining district, in the county of Mineral and State of Colorado, in the district of lands subject to sale at Del Norte, and bounded, described and platted as follows, with magnetic variation fifteen degrees east:

Beginning at corner No. 1, a pine post five inches square marked 1/7406, in mound of stones, from which U. S. location monument No. 7333 bears north twenty-six degrees, forty-three minutes and thirty seconds west one thousand seven hundred and sixty-five and eight-tenths feet distant; the west quarter corner of section twenty-four in township forty-two north range one west, New Mexico meridian, bears south thirty degrees west two thousand six hundred and sixty and five-tenths feet distant; corner No. 3 of survey No. 7347, the Sunnyside Lode claim, bears north fifty-six degrees and thirty minutes west one hundred and seventeen and seventy-six hundredths feet distant; corner No. 2 of survey No. 7296, the

Annie Roony Lode claim, bears north fifteen degrees and twenty-one minutes east one hundred and thirteen and thirty-nine hundredths feet distant; corner No. 6 of survey No. 7296, the Forrest King Lode claim, bears north fifty-six degrees and fifteen minutes west two hundred and two and fifty-four hundredths feet distant; corner No. 2 of survey No. 7263 A, the Last Chance Lode claim, bears north forty-five degrees and twenty-seven minutes west three hundred and ninety-six and fifty-five hundredths feet distant; a red spruce tree sixteen inches in diameter blazed and marked B. T. 1/7406 bears south eighty-two degrees and forty-four minutes west six and eighty-five hundredths feet distant; and a red spruce tree eight inches in diameter blazed and marked B. T. 1/7406 bears north thirty-two degrees and fifty-four minutes east five and six-tenths feet distant.

8 Thence, first course, north thirty-three degrees and forty-two minutes west one thousand three hundred and fifty-nine and seven-tenths feet to corner No. 2, from which discovery shaft bears south twenty-three degrees and twenty-one minutes east six hundred and forty-two and eight-hundredths feet distant.

Thence, second course, south sixty degrees and twenty-six minutes west one hundred and twenty-eight and sixty-nine hundredths feet intersect line 6–7 of the Del Monte Lode claim survey No. 7356 at north thirty degrees and twenty-two minutes west one thousand and eighty-nine and seventy-two hundredths feet from corner No. 6; two hundred and sixty-five and sixty-one hundredths feet to corner No. 3.

Thence, third course, south thirty-three degrees and forty-two minutes east one hundred and ninety-three and thirty-eight hundredths feet intersect line 5–6 of said Del Monte Lode claim at south fifty-nine degrees and forty minutes west seventy-three and thirty-three hundredths feet from corner No. 6; one thousand three hundred and fifty-nine and seven-tenths feet to corner No. 4.

Thence, fourth course, north sixty degrees and twenty-six minutes east two hundred and sixty-five and sixty-one hundredths feet to corner No. 1, the place of beginning;

Expressly excepting and excluding from these presents all that portion of the ground, hereinbefore described, embraced in said Del Monte Lode claim, survey No. 7356, which is described as follows: Beginning at corner No. 3 of said lot No. 7406; thence south thirty-three degrees and forty-two minutes east six hundred and sixty-eight and fifty-five hundredths feet; thence, north ten degrees and four minutes west two hundred and eighty-two and seventy-seven hundredths feet; thence, north thirty degrees and twenty-two minutes west three hundred and ninety-nine and ninety-two hundredths feet; thence, south sixty degrees and twenty-six minutes west one hundred and thirty-six and ninety-two hundredths feet to corner No. 3, the place of beginning; also, beginning at corner No. 6 of said Del Monte Lode claim survey No. 7356; thence north thirty degrees and twenty-two minutes west one hundred and fifty-three feet; thence, south eighty degrees and twenty-five minutes west eighty-nine and seventy-six hundredths feet; thence, south thirty-

three degrees and forty-two minutes east one hundred and eighty-four and ninety-four hundredths feet; thence north fifty-nine degrees and forty minutes east seventy-three and thirty-three hundredths feet to corner No. 6, the place of beginning; and also all that portion of said New York vein or lode and of all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground, said lot No. 7406 extending one thousand three hundred and fifty-nine and seven-tenths feet in length along said New York vein or lode, the granted premises in said lot containing six acres and forty-six hundredths of an acre of land, more or less.

Now know ye that there is therefore hereby granted by the United States unto said A. L. Shear, and to his heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said New York vein, lode or ledge, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 7406 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises;
9 provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. 7406, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges: And provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to his heirs and assigns forever; subject nevertheless to the above-mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of the courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mine

ing claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the fifth day of April, in the year of our Lord one thousand, eight hundred and ninety-four, and of the Independence of the United States the one hundred and eighteenth.

[SEAL]

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
L. Q. C. LAMAR,
Recorder of the General Land Office.

The relative locations of the three said claims is correctly shown by a plat marked Exhibit "A," which is hereto attached and made a part of this statement.

(Here follows diagram marked p. 9*a*.)

When the owners of the Last Chance applied for patent thereto proceedings in adverse under the statute were instituted against it by the owners of the New York lode, and an action in support of such adverse was brought by them in the United States circuit court at Denver, which was numbered 2753, and entitled Shear *vs.* Granger and others, and judgment therein was entered on the 18th of June, A. D. 1892, in favor of the plaintiff, the owner of the New York, and against the defendants, the owners of the Last Chance, awarding all territory in conflict to the New York Lode mining claim.

The Del Monte is the oldest patent, the New York second, and the Last Chance third. The ground in conflict between the New York and Del Monte, except so much thereof as was also in conflict between the Del Monte and Last Chance locations, is included in the patent to the Del Monte claim. The New York secured a patent to all of its territory, except that in conflict with the Del Monte, and the Last Chance in turn secured a patent to all of its territory except that in conflict with the New York, in which last-named patent was included the triangular surface conflict between the Del Monte and Last Chance which by agreement was patented to the latter. The Last Chance claim was located upon a vein, lode, or ledge of silver and lead bearing ore which crosses its north end line and continues southerly from that point through the Last Chance location until it reaches the eastern side line of the New York, into which latter territory it enters, continuing thence southerly with a southeasterly course on the New York claim until it crosses its south end line. No part of the apex of the vein is embraced within the small triangular parcel of ground in the southwest corner of the Last Chance location which was patented to the Last Chance as aforesaid,

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and for the purposes of this controversy only it is conceded that no part of the apex of the vein is within the surface boundaries of the Del Monte Lode mining claim. For the purposes of this suit only, it is conceded by both parties that the position and course of
11 the vein and the workings thereon are shown by the plat hereto attached, marked Exhibit "B," and made a part of this statement, the apex being represented by the dotted line so designated thereon. The vein dips rapidly to the west and is rich in silver and lead.

(Here follows map marked p. 11a.)

The Last Chance Mining and Milling Company, the appellee, has driven what is called a main incline shaft from the apex of the vein upon the Last Chance ground downward and upon the dip of the vein to a depth of over nine hundred feet. This shaft in its downward course has penetrated beneath the eastern boundary of the Del Monte claim and considerably beyond, and levels have been driven upon the vein northerly and southerly from the shaft within the boundaries of the Del Monte, extended downward vertically, from which the Last Chance Company has been extracting, removing, and selling large quantities of valuable ore, and the mining and extracting of said ores has been carried on by the appellee under a claim of ownership of the apex of said vein in Last Chance territory.

The appellant, conceding the position of the apex of the vein as claimed by the appellee, denies its right to follow the same in its downward course into appellant's territory.

The appellant filed its complaint in the court below on the 12th day of March, 1895, praying a temporary writ of injunction until the action of ejectment between itself and the appellee should be determined, to which complaint the defendant answered on the 28th of March, 1895, denying the right of the defendant to the relief prayed for, and pleading the ownership of the apex of the vein as hereinbefore set forth as represented upon said plat, claiming the right to follow said vein in its course downward, even though it so far departed from a perpendicular as to cross the west line of the Last Chance extended downward vertically into the territory
12 of the appellant. The appellant filed its replication thereto on the 29th of March. The case being thus at issue, it was agreed by counsel for the respective parties that the pleadings, together with the patents to the Last Chance, New York, and Del Monte claims, the defendant's plat, a certified copy of the judgment in the case of Shear against Granger, and the affidavits of Schwartz, Darby, and Colwell, should constitute a record upon which final decree might be entered. The case being thereupon submitted, a decree was entered upon the 30th day of March, 1895, dismissing the bill at the cost of the complainant.

The portion of the vein in controversy between the parties to this suit is that portion lying under the surface of the Del Monte claim and between two vertical planes, one drawn through the north end

line of the Last Chance claim extended westerly and the other parallel thereto drawn through the "north compromise line," as shown upon plat marked Exhibit "B," herewith transmitted.

And the said United States circuit court of appeals hereby certifies that, to the end that it may properly decide the questions in said cause and presented by the assignment of errors therein filed, the said court desires the instruction of the Supreme Court of the United States upon the following questions and propositions of law, to wit:

1. May any of the lines of a junior lode location be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?

13 2. Does the patent of the Last Chance Lode mining claim, which first describes the rectangular claim by metes and bounds and then excepts and excludes therefrom the premises previously granted to the New York Lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim?

3. Is the easterly side of the New York Lode mining claim an "end line" of the Last Chance Lode mining claim within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?

4. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?

5. On the facts presented by the record herein has the appellee the right to follow its vein downward beyond its west side line and under the surface of the premises of appellant?

In witness whereof the undersigned judges, holding the said United States court of appeals for said eighth circuit, have hereunto set their hands this ninth day of March, A. D. 1896, at St. Louis, Missouri, and order and direct that the foregoing certificate be filed in said circuit court of appeals and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

14 United States Circuit Court of Appeals for the Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of The Del Monte Mining and Milling Company, appellant, *vs.* The Last Chance Mining and Milling Company, No. 651, December term, 1895, was duly filed and entered of record in

my office by order of said court and as directed by said court. The said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this ninth day of March, A. D. 1896.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] Original. U. S. circuit court of appeals, eighth circuit. 1895, December term. No. 651. Del Monte Mining and Milling Company, appellant, *vs.* Last Chance Mining and Milling Company. Certificate of questions to the Supreme Court of the United States. Filed Mar. 9, 1896. John D. Jordan, clerk.

Endorsed on cover: Case No. 16,237. U. S. circuit court of appeals, eighth circuit. Term No., 147. The Del Monte Mining and Milling Company, appellant, *vs.* The Last Chance Mining and Milling Company. Certificate. Filed March 21, 1896.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 147 (16,137).

THE DEL MONTE MINING AND MILLING COMPANY, APPELLANT,

vs.

THE LAST CHANCE MINING AND MILLING COMPANY, APPELLEE.

CERTIFIED FROM UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLANT.

The elaborate discussion by appellee's counsel of the two most important questions certified to this Court, and their novel claim of extra-lateral rights to the Last Chance vein, so called, imposes upon us the necessity of a formal reply. In framing our original argument we had before us, of course, the brief filed by appellee in the court of appeals. To some extent we could therefore anticipate and try to meet

the claims of counsel. Their supplemental brief, however, prepared after ours was delivered, taken in connection with its predecessor, suggests some matters of importance not fully covered by our brief, and for whose consideration we beg the indulgence of the Court.

It will be observed, we think, that the appellee's most earnest and anxious contention involves its right to locate its south end line across and upon the previously appropriated New York territory. It plaintively assures the Court that with the New York it has no controversy; that the latter is quiescent and sympathetic, and that the appellant has therefore no reason for complaint. Conscious, however, that this circumstance is wholly unimportant, and that some definite claim of right or of ownership must be asserted in order to justify the intrusion, it puts forward one of the most remarkable propositions ever advanced, even under the mining act of 1872. It is in substance that by relocating a part of the apex of the already located New York vein, it may acquire title to such part of that vein which lies below the point of divergence of the extended New York end lines from its own. This proposition is asserted with a plausibility and argued with an adroitness that are far more commendable than convincing.

If we correctly understood appellee's original position, it was that the Last Chance south end line was of necessity placed upon New York territory in order to secure that parallelism which must exist to confer extra-lateral rights to that part of the vein which was locatable. If we correctly understand Judge Hallett's decision, it is founded upon that condition. Much more than this is now claimed; and if anything were needed to emphasize the unsoundness of appellee's contention, that thing has been thus supplied by its counsel; for it may be safely asserted that they are too wise, too experienced, and too practical to deliberately advance such an extravagant claim, did not the nature of their client's case imperatively require it.

We have commented heretofore upon counsel's endeavor to establish some distinction between "patented surface" and "lines of location," and upon the extracts from the statute which are quoted to sustain their contention. We have nevertheless to notice specifically two or three statements appearing in the brief in connection therewith. After assuming to their own satisfaction that boundaries of the claim can be laid anywhere, counsel assure us that parallel end lines thus laid upon the ground by the locator "are necessarily and of course subject to any superior rights, either on the surface or underground, possessed by another" (p. 10, first brief).

It is also said that "*as a result of the requirement that locations shall have parallel end lines* and because the validity of conflicting locations is a question of uncertainty, mining claims do overlap each other in all conceivable directions" (p. 10, first brief).

The first sentence above quoted involves an admission of our claim, since the "superior rights" referred to are the full equivalent of the entire conflict, both as to surface and as to lodes—that is, they are "exclusive" and made so by law. The statement that the statutory requirement of parallelism of end lines is the cause of conflicting locations, is wholly untenable. In the first place, conflicts for that purpose are never necessary. Again, if they were, the overlaps could not and would not be "in all conceivable directions." They do so appear, and for reasons already assigned, to say nothing of the fact that each conflicting location is, in theory at least, upon a distinct vein. It is because of this theory and because of the earlier practices of the land office under the act of 1866, as a recent able authority has clearly shown, that the patent recitals assume to give the number of feet of the lode conveyed; a formula which is meaningless. (Lindley on Mines, secs. 59 and 780.)

But counsel continue:

"The necessary consequence of the requirements of the statute as to the way of locating mining claims was recognized by the law-makers in providing for the settlement of adverse rights, in which a clear distinction is made between the claim as located and the surface as patented" (p. 11, first brief).

No such consequence as the one assumed was either provided for or anticipated. Conflicting rights arising from disputes as to priority of discovery, location, failure to comply with Federal and local laws, &c., are alone contemplated by section 2326. Proceedings under that statute are instituted "to determine the question of the right of possession"—that is to say, possession of the conflict or adverse claim (Iron Silver Mining Co. *vs.* Campbell, 135 U. S., 286). That it was intended to enable a trespasser to show that his trespass was essential to the required parallelism of his end lines was never before seriously asserted. However, it is said that—

"The fact that the lines of different locations cross each other does not make the lines of the junior claim any the less actual. A line itself does not have either breadth or thickness. It is but a method of designation to show the limits of underground as well as of surface rights," &c. (p. 14, first brief).

If because the lines are neither thick nor broad they may therefore be laid anywhere, there is, of course, an end to the controversy. We confess them to be "but a method of designation." Yet, as it is a statutory method and one upon which property rights are made to depend, they are and must be more than imaginary and must be laid on the public domain. Section 2322, Revised Statutes, declares that—

"The locators of all mining locations * * * situated on the public domain, * * * so long as they comply with the laws, * * * shall have the *exclusive* right of possession and enjoyment *of all the surface included within*

the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth," &c.

How can this possession and enjoyment be exclusive if others may invade it and by such invasion initiate rights of any sort, whether against the locator or some third person? And if the locator's line of location is the boundary of his exclusive right, what prevents the lines of the junior location being as exclusive as those of the senior location? Why are not each exclusive of the other and of the world beside? The statute, of course, provides against this manifest impossibility by forbidding one locator to enter another's premises; but counsel would revise the statute by creating two or more exclusions, as the case may warrant, each in harmony with all, and all against adverse *underground* claimants; for if the "Last Chance" can invade the "New York" from one end, the "First Chance" may invade it from the other. The "Best Chance" may come in from the west and the "Only Chance" from the east. All of them may plead the same necessity, and the original locator's claim become a patchwork of triangles, hexagons, octagons, and polygons. His exclusive right would be a conclusive farce, subject to the claims or the caprice of all men.

Counsel anticipate the force of this statutory provision and therefore assure the court that their proposition "is not affected by it," because it "has never been held in practice to prevent the extending of a survey over previously appropriated territory for the purpose of defining a second location, *which second location is, of course, subject to an exclusion in favor of the first locator*," and also because in the case at bar they were actually made (pp. 14 and 15, first brief). If the second location is only subject to *an* exclusion in favor of the first one, the character and scope of it must be given before its effect can be properly determined. If it is *the* exclusion of

the statute, it is absolute; and hence it cannot "define the second location," which ceases at the point of conflict.

If the statute does not affect the appellee because its location has in fact been made, then it must follow that the way to avoid the statute is to deliberately violate it. This makes it binding only on those who wish to observe it, and protective only when and as long as it may be regarded. Equity is said to consider that as done which should have been done. Counsel would paraphrase this salutary precept by considering that to have been authorized which has been accomplished.

We are accused by counsel in their supplemental brief of misconceiving their position. It is therefore restated on page 14 of that brief as follows: "That in order to obtain that which has not already been granted, it may be necessary to lay survey lines upon territory already appropriated."

Everything in "the territory already appropriated" has "already been granted," except veins apexing elsewhere, which in their downward course enter underneath it. These may be followed thereunder when properly appropriated, and that can be done only by locating them on public domain. "That which has not already been granted" must, therefore, be that which is not within the territory at all. Hence we cannot concede any misconception on our part or see wherein counsel have at all improved their claim by its restatement. Their admission on page 21 is, on the contrary, a recognition of the soundness of our criticism and practically a surrender of the question. It is there said:

"We say that between the north end line and the south end line of the rectangular location we have everything, surface and vein, which has not been previously appropriated; and that means the entire rectangular surface *after excluding from it so much of the surface as is within the New York location, and so much of the Last Chance vein and other veins which apex within the New York location.*"

We are unable to reconcile this statement with appellee's claim. This may be due to inherent infirmity; nevertheless it appears to define with much clearness that which we have endeavored to demonstrate. It is merely an assertion that "a grant of Y is the equivalent of a grant of X + Y minus X."

Counsel have omitted all direct reference to Secretary Teller's circular appended to our brief. It is hardly in keeping with appellee's plea of necessity. At the hearing in both the lower courts Mr. Teller appeared for appellee and participated in the arguments. That circumstance may have made it awkward to attempt either comment or criticism. Now, that he seems to have withdrawn from the case, his construction of the statute while engaged in its execution, if unsound, may be discussed without embarrassment. Its conflict with appellee's insistence is obvious. The capacity and experience of its author are beyond dispute. If he, as Secretary of the Interior, committed the blunder of prohibiting citizens of the United States from defining the lines of their locations so as to secure some valuable acquisition not included within previous locations of the same ground, the fact should have been ascertained and the fault rectified. The only attempt to do so is the indirect one manifested by the insertion of an appendix to the supplemental brief, containing a letter, a circular, and two Land Office decisions. We infer that this is intended to dispose of the Teller circular without comment.

The letter is dated November 5, 1874, and is from the Commissioner to the surveyor general (p. 26, supplemental brief). It merely instructs the surveyor general that he has no jurisdiction to decide rights involved in conflicting claims; that each claimant is entitled to a survey of his entire claim, and that where two claims conflict, the plat and field-notes should show its area, extent, boundaries, and distance of intersection from established corners. No one questions this, although subsequently the practice of the surveyor general was for a

time otherwise. By section 2326 the courts, and not the land officers, must determine the question of the right of possession of these surface conflicts, and their decision is conclusive.

The circular of Commissioner McFarland is merely an elaboration of the Burdett letter. The Teller circular is addressed to "registers, receivers, and surveyors general," and specifically refers to applications "where the survey conflicts with *a prior valid lode claim or entry*, and the ground in conflict is excluded." It is subsequent to the circular of McFarland, and if its principal features have since been modified or corrected, the industry of counsel would have discovered and revealed the fact.

It will be observed that the decision in the case of the "Grand Dipper" lode bears date August 2, 1883, or more than a year previous to the publication of the Teller circular. If opposed thereto, it ceased from that time to be controlling. But it evidently refers to a survey which failed to show a subsisting conflict, and which should be noted for the instruction of the department. The "second paragraph of the circular of December 4, 1884," to which counsel calls attention on page 29, is a reference to the Teller circular itself. Just how it can benefit appellee, or why it should be so obscurely referred to, we do not understand.

The case of the Black Diamond lode is directly in our favor. This readily appears from a careful reading of the quotation in appellee's brief (p. 29):

"For the purpose of including ground held and claimed under a lode location, *which was made upon public land and valid when made*, the end line of the survey of said lode claim may be established within the boundaries of a patented placer." (22 L. D., 284.)

Known lodes are expressly excluded from the operation of a placer patent, unless applied for and entered as lodes. The Black Diamond having been "located on public land

and valid when made," the patent for the placer excluded it, and its end line was therefore on public land or a part of the valid lode claim, although physically within the boundaries of the placer. These citations cannot be construed into a support of appellee's position.

It is true that the patent recites the length of the Last Chance vein, which is commensurate with the length of the alleged claim from end line to end line; but it is not claimed to that extent as against the New York, and hence our assertion that as to the conflict it cannot be claimed at all. This, as before stated, is due to the peculiar theory that every location is presumed to have been made upon a distinct vein, and to the practice which grew up in the Land Department under the mining act of 1866. This practice and the reasons for it are well illustrated by Mr. Lindley, vol. 1, sec. 59, of his recent work on Mines, who well says (vol. 2, sec. 780) that the patent will only convey so much of the lode as has its apex within *the boundaries*, and the call for length in the patent is useless.

If this were not so the specification of length of vein would give the New York 1,500 feet thereof, for the recitals of its patent are similar to those of the Last Chance. The Flagstaff, Amy, Argentine, Stone, and other patents which by this Court have been limited to the segment of the vein actually enclosed by the patent boundaries are all similar to that in the case at bar, and hence we do not perceive the necessity of seriously considering the recitals. It is the vein or veins within the ground actually locatable that passes either by the location or the patent, or both, and this cannot be extended by implication or otherwise.

"As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location."

1 Lindley on Mines, sec. 363.

"To the extent that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void." (*Ibid.*)

Hence the rule that a senior valid location, if abandoned, must be relocated by a junior location conflicting therewith if the latter would acquire the ground so abandoned.

Johnson *vs.* Young, 18 Col., 625.

Oscamp *vs.* Crystal River M. Co., 58 Fed., 293.

Note especially criticisms and diagram of Mr. Lindley, vol. 1, sec. 365, pp. 475–'6.

But, say counsel, the practice of the Land Department in first describing the premises included within the entire location, and then excluding those parts thereof hitherto conveyed to or covered by other locations, is intended to give to the patentee some extra-lateral underground right or rights not in conflict with those of the senior location. Hence the practice. The nature of these supposed rights will be discussed hereafter; the practice we will consider for a moment, notwithstanding the transparent fact that the unconditional character of the exception may make it unnecessary.

Mr. Lindley, vol. 1, sec. 782, calls attention to the practice, and says that it is adopted by the department *in the case of alleged cross-lodes.* Waiving the question whether, if a cross-lode right exists at all, it needs any such patent recital for its enjoyment, the facts here do not remotely suggest the idea of a cross-lode. On the contrary, the identity of the vein in the New York and Last Chance locations is freely conceded. But, says Mr. Morrison:

"Notwithstanding this apparent exception of previous entries, the system of granting overlapping patents is indefensible. A glance at the plat of any late patent in a well-developed district will introduce the subject to the reader. Three or four surveys partly crossing, partly parallel, and intersecting at all angles are frequently seen, so that unless the plat be colored the eye can scarcely distinguish one

from another. Only the rigid application of the rule of preference to prior patents can ever relieve this matter from difficulty, for while the words of a patent always except the *surface* and *claim* of previous surveys, they still proceed on the fallible supposition that each survey indicates a separate *vein.*"

Morrison's Mining Rights, 9th ed., p. 109.

The fact that the practice now criticized was, so far as it can be justified at all, founded on the "fallible supposition" of a separate or cross-vein is supported by the requirement of the department that whenever a supposititious end line is thrown within or across a previous location, proof shall be furnished that the assumed vein actually crosses such line. Without such proof the patent is withheld. We have in our original brief gone into the subject quite fully, however, and will not here repeat the argument. (See appellant's original brief, pp. 17–24.)

The fanciful distinction drawn by counsel between "patented surface" and "lines of location" could not exist if no patent had issued to the Last Chance claim. It cannot be contended since the decision in Belk *vs.* Meagher, 104 U. S., 279, that the patent is any more comprehensive than the location, so long as the owner of the latter complies with all legal requirements. This being true, it may be pertinent to consider what the attitude of the Last Chance Company would be to this litigation if its claim were still unpatented. What under such conditions would be its boundaries and its rights? Could it then claim an extra-lateral ownership of the apex of its vein based upon its end line swung across the patented New York? Could it then deny that the New York easterly side line was the limit and boundary of its claim in that direction? Could it with equal facility and plausibility indulge in refinements between "unpatented surface" and "lines of location," or would not its "rights be determined in case of his neglect to rectify his lines by reference to the intersected boundaries of the senior locator,

regardless of where the junior's monuments are placed or the course of the lines connecting them"?

1 Lindley on Mines, sec. 365.

If the New York easterly boundary which is crossed by the vein does not become the Last Chance southerly end line, from the very nature of the case and from the decisions of this Court, which declare that to be an end line which lies crosswise of the vein, then we must confess our inability to discern 'twixt rhyme and reason. If it is, there is an end to this case, for its non-parallelism with the north end line is evident, and the Court will not make a location for the appellee. It may be that since the lines converge and must, therefore, unite when extended, this Court will be inclined to follow the rule announced in Carson City Co. *vs.* North Star Company, 73 Fed. R., 597, and recognize the appellee's right to all that part of the vein lying within and above the point of the intersection of the two lines extended. More than this the appellee cannot ask, and as much as this is, we submit more than the letter of the law will justify.

Counsel, however, seek to escape from this result by announcing the proposition that "*if the apex of a vein enters across one end line thereof the locator will own as much of the vein at any depth as he owns of its apex, subject only to superior rights of other apex claimants*" (p 17, first brief).

It will be observed that this assertion completely *ignores both the direction or course of the vein and the position of the other end line.* If it is true, the vein might differ but one degree in direction from the course of the end line, or the other end line might fail by 89 degrees to parallel the one which the vein crosses. All that is necessary to the rule is the crossing of one end line by the apex of the vein. We would be unjust to the great ability of counsel if we supposed them to intend that we should take this remarkable proposition seriously. They plead in extenuation of it that "the course

which the New York side line takes across the apex is by reason of the location of the New York and not by reason of the location of the Last Chance. The east side line of the New York *which makes by reason of priority of claim* A BOUNDARY FOR THE PATENTED SURFACE *of the Last Chance* was not located by the Last Chance discoverers nor had they any voice in fixing its direction. *It is but an obstacle which interrupts what would otherwise be* their right to follow upon the apex of this vein for a further distance of six hundred feet within the lines of their claim as laid" (p. 18, first brief).

It is immaterial that this New York side line was laid by others, and that the Last Chance discoverer had no voice in fixing its direction. It is an obstacle, and therefore a boundary. It marked the dividing line between private ownership on the one side and public domain on the other. To it the Last Chance lines could go. Across or upon it they had no right, and could acquire none by any act of location. They could at the point of crossing have drawn an end line parallel with the other, or they could have made their end lines parallel to those of the New York; but they determined to contest the right of the New York to a part of its ground, and so they laid their lines in conflict with it. They were beaten, but even then they refused to rectify their lines. Can they now justify their incursions into appellant's property under the old plea of, "It was the woman who did it"? Or that when legally ejected from New York territory they nevertheless left a line there for future emergencies, and which they now have the right to conjure with?

While nothing in express terms is said in either of their briefs to that effect, counsel nevertheless seem to us to assume that this common boundary between the Last Chance and New York claims is a side line of the Last Chance, if it is anything, for in this immediate connection they proceed to a consideration of extra-lateral rights based upon a vein which crosses an end and a side line of the

claim in which it is found. In our original brief, page 33, we have endeavored to show that it cannot well be anything but an end line, and counsel have not replied as to this contention, except to say that it is a boundary of patented surface only, and therefore not controlling as to extra-lateral rights. We may, however, and for the sake of argument only, assume the easterly side line of the New York to be a portion of the westerly side line of the Last Chance. The inquiry immediately arises as to where the south end line can then be. Surely not in the New York ground, for this westerly side line joins the easterly one at a point. That point cannot be an end line, for it has not even the element of length, to say nothing of breadth and thickness. The only answer is that it is a claim with but one end line; that is, of course, parallel with itself; but it has no companion. How, then, can the vein be followed outside the Last Chance vertical boundaries? Not by the statute, for that contemplates no such condition. Not by the authorities, for Montana Co. *vs.* Clark, 42 Fed. R., 626, the only one directly in point, denies it.

We do not, however, shrink from a further consideration of the question, How far, if at all, the owner of a vein crossing a side and end line of a location may follow it? Counsel say this is an open question, "only because since the Amy-Silversmith case very vigorous efforts have been made by persons owning surface but not apex to restrict extra-lateral rights, and because the question presented by them has not been expressly decided by this court." The last reason is correct. To the other may be added the fact that owners of tops of veins have been prone to insist that courts shall cure their own mistakes and give them extra-lateral rights, whether they have complied with the law or not; and they have occasionally succeeded.

It will not be disputed that the right of a lode mine-owner to pass beyond his vertical boundaries and enter underneath his neighbor's territory in pursuit of his vein is

contrary to the common law and must be strictly construed. The burden is therefore upon him to show compliance with all the requirements of the law which confers the right.

Iron Silver Co. *vs.* Elgin Co., 118 U. S., 196.
Bluebird Co. *vs.* Murray, 9 Mont., 468.
Driscoll *vs.* Dunwoody, 7 Mont., 394.
Iron Silver Co. *vs.* Campbell, 17 Col., 267.
2 Lindley on Mines, sec. 866.

The parallel end lines, the ownership of the apex within them, the continuity of the vein, &c., must affirmatively appear. The absence of such conditions, or any of them, conclusively implies the absence of the right. It is contended that a statute requiring the vein to be within the end lines does not necessarily mean that it should "pass out" of both of them. Does it necessarily mean that it shall "pass out" of one of them in order to be "within" both of them? If a vein crosses the two side lines as laid on the surface, the portion of it inside the claim is as much "within the end lines" as though it crossed them both. It is in that case "inside the surface lines." This Court in a number of cases has defined the end lines of a claim to be those "which lie cross-wise of the general course of the vein," and they must cross it if the vein is longer than the claim, which is almost universally the case. These lines too, by the statute, must be such that, *so continued in their own direction, they will intersect the exterior parts of such veins or ledges.* This must refer to the lines which cross the vein or it is meaningless.

In their supplemental brief counsel assure the court that "the Last Chance claim was located *along* the Last Chance vein and not crosswise of it" (p. 2). Appellee's right, therefore, in the language of this Court in the Flagstaff case, is said to "extend to as much of the lode as the claim covers." In that, as in the other cases determined by this Court, the lines crossing the vein were parallel, and hence expressions

such as that last quoted. Whether a claim is in length along a vein would seem by counsel to depend on its relation to the side lines. If more nearly with them than with the end lines, it is along the claim. It was this impression which caused the trial courts to decide the Amy Silversmith case against the doctrine of the Flagstaff case. It is this error which make the Consolidated Wyoming and Carson cases palpably opposed to the Amy decision. Legally, we think, it may be said that a claim is located along a vein when the vein crosses its end lines; otherwise not. This conclusion is based upon the decisions of this Court that if the side lines of a claim as located lie across the vein they become its end lines for all extra-lateral purposes, and the angle of the crossing is immaterial. If that be so, the crossing of a side and an end line by the vein as located makes them both end lines, and the angle of the crossing is immaterial. If such angle is in either case a material fact, the right must be determined by the physical condition of each particular location, and the law becomes devoid of all certainty.

To show the necessity of a general rule such as we are now contending for, we call attention to the plat marked "A" at the end of this brief. It comprises five figures of lode claims, representing the positions of the vein in each as differing from all the others.

In figure 1, the vein crosses each side line near the northwest and southeast corners, and is practically lengthwise of the claim. Nevertheless, under the decisions, the side lines are the end lines.

In figure 3, the same vein is so located that it passes through the east end line at the extreme southeast corner of the claim and crosses the north side line as in figure 1. The physical difference between the two is scarcely perceptible, but the legal difference must be very great if the principle of the Tyler, Last Chance, and kindred cases shall control, for the owner of figure 3, by the merest accident,

may draw a new "legal" west end line near his old one and then pursue his vein on its normal dip through a segment thereof more than 1,400 feet long.

Figure 4 represents a claim located practically at right angles with the vein, whose side lines become end lines, and the 300 feet of apex covered by the claim may be followed to any depth within such lines; but figure 2 represents the same location, with the vein crossing an end and a side line and practically crosswise of the length of the claim. Here the owner, under appellee's contention, has the privilege also of drawing one new west end line, but he must place it 1,400 feet east of the one he located and confine his extra-lateral right to a space of 100 feet in width between said lines.

Figures 5 and 6 are intended to illustrate the effect of counsel's proposition upon other veins than the one located, and which may be included within the lines of the location. In figure 5 it might be said that since the claim was located across and not along the course of the vein, the locator cannot complain because he cannot follow his second vein beyond his lines. In figure 6, however, the course of the vein is parallel with the location, although the part covered by the location is not. The same end lines must define extra-lateral rights to all the veins within the claim, and it would seem, notwithstanding this, that the created end lines in each instance would deprive the owner of his right to follow any other than the vein located. It is more equitable when the vein crosses the end and the side line to confine the owner to his boundaries as a consequence of his failure to comply with the law.

The fact, then, that a claim is located along the vein or lengthwise of the vein is not controlling. The Amy claim was more nearly lengthwise than crosswise. The Stone Lode claim in the Elgin case was along the vein, and its unusual shape was entirely due to that circumstance. Indeed, the appellant there plead physical configuration as compel-

ling it to lay the claim in the form of a horseshoe. In Duggan *vs.* Davy, 4 Dakota, 110; S. C., 26 N. W., 887, the plaintiff's claim was laid along what seemed to be the outcrop or edge of the vein. It was proven, however, that this exposed top or edge was the eroded dip, and therefore no part of the course or strike of the lode. In Catron *vs.* Old, 23 Col., 433, which counsel says "is not at all parallel" with this case, the general course of the Fulton claim was along the vein. The latter made its entrance into and exit from the location across the same side line which was laid with an angle in its center. The segment of the vein actually embraced by the location was as much *within the end lines* as though it passed through them both, and fully as much so as it would be if by reason of its brief extent it began and ended within the lines of the location. Counsel apparently concede the soundness of the decision. How much stronger is the case at bar, involving a location with peculiarity of shape, disregard of statutory requirements, and dissimilarity to all those locations wherein decisions favorable to its contention have been made.

But we are asked with much confidence whether a claim inclosing a segment of a vein which crosses one end line, but which terminates before the other is reached, would not possess extra-lateral rights thereon? To this we reply that much would depend upon the circumstances of the particular case. The other end line must be parallel, certainly, or no such right would attach. Such a claim, before patent, at any rate, would be void beyond the point of termination, and if the fact were known by the Land Department no patent would issue for the excess. The lines would have to be re-formed in consequence. After the issuance of the patent the case would have to be largely governed by the facts disclosed by the testimony. Suppose, for example, that such a vein entered the claim through an end line, but at an angle of 40 degrees to the side line, or that it entered through a side line and terminated in the direction of the other or of

an end line, or that at the point of termination its course should be toward the line it had previously intersected. What rule should be invoked for the advantage of the claim-owner under such conditions? They are as pertinent to this controversy as the one supposed by counsel, although that one seems to have been encountered in the Carson City case; (73 Fed., 597), a case, however, which arose under locations made under the act of 1866, which was silent as to the position of end lines, and which practically required them to be drawn or assumed at right angles to the course of the vein, and in which case their position was deemed unimportant, because they converged on the dip, thus limiting extra-lateral rights, as they were extended on the dip from the location.

The Elgin case, of course, commands the principal share of attention, doubtless, because it is squarely opposed to counsel's proposition quoted *supra*. (*Vide p.* 17, *first brief of appellee.*) The vein there "entered the location across one end line thereof," but it was not held that "the locator owned as much of the vein at any depth as he owned of its apex." The vein, too, crossed an end and a side line *as located;* or, if you please, two end lines which were non-parallel. Both counsel for appellee and the learned judges of the 9th circuit who wrote the decisions in the Consolidated-Wyoming, the Doe-Sanger, and Tyler-Last Chance cases have misconstrued or misunderstood it, as the extracts from those decisions in the appellee's two briefs abundantly show. Thus the Court, in Doe *vs.* Sanger, say that—

"The objection there was not that the end lines of the Stone claim were out of parallel; and, as a matter of fact, what were claimed to be the end lines *were* parallel. The objection rested on the general 'form or shape' of the Stone surface location, and on the fact that the disputed ore in the Gilt Edge was not within vertical planes drawn through the end lines of the Stone claim" (*pp. 4, 5, appellee's supplemental brief*).

And the Ninth Circuit Court of Appeals, in Tyler Co. *vs.* Sweeney, 54 Fed. R., 292, makes the comment that—

"The learned justice who wrote the opinion in the Horseshoe case, when he said that the parallelism of the end lines 'is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines,' did not mean that it was essential to such right that such lode should extend in its length from *one end line to the other* of the location" (*p. 25, appellee's first brief*).

If this construction of the Horseshoe case is at all pertinent, it means that parallel end lines are important only when the vein is longer than the location upon it, or when it actually crosses both of them. If the vein is shorter than the location, or crosses only one end line, it is immaterial whether the other end line is parallel or not. We respectfully submit that "the learned justice who wrote the opinion" never dreamed that such a construction could be placed upon or drawn from it.

But counsel give their own interpretation to the decision. They say that it "was not in any respect based upon the relation of the apex to the side lines, but was based upon the form and shape of the surface claim and upon the fact that what the locator designated as his end lines would not if extended embrace the ore in controversy" (*p. 6, supplemental brief*).

We cannot well comprehend how a decision "based upon the form and shape of the surface claim" can ignore "the relation of the apex to the side lines." It certainly had regard to "*the relation of the apex to the end lines*" (not one end line), and determined that the two lines crossed by the apex of the vein were not parallel to each other.

It also determined that the south end line, so called, was

not an end line because not crossed by the vein, for the opinion expressly states:

"*The end lines* (of the Stone claim) *are not and cannot be made parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line.* The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure, *and, apparently for no other reason than their parallelism, called them end lines.*" (118 U. S., 206.)

"We are therefore of opinion that *the objection that by reason of the surface form of the Stone claim* the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim was well founded. Besides, *if the lines marked as end lines* on the plat of that claim *can be regarded* as the end lines of the location, no part of the Gilt Edge claim falls within vertical planes drawn through those lines extended in their own direction." (*Ibid.*, p. 207.)

In the presence of such statements we cannot justly be accused of unfairness if we insist that some of the Pacific slope decisions were written, and that counsel for appellee rest under a misapprehension of the nature and foundation of the Elgin case. This insistence may be emphasized, if need be, by a last quotation:

"Even then, with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment, according to subterranean developments made by mine workings." (*Ibid*, p. 207.)

We are, of course, aware that this Court in the Amy-Silversmith case announced that it had never decided what extraterritorial rights exist if a vein enters at an end and passes out of a side line, and that such announcement is conclusive. Nevertheless, we may suggest that the state-

ment must be founded on the circumstance that the lines actually intersected by the vein in the Stone claim and which were "crosswise of the general course of the vein" were the end lines; for if it be true that the decision went upon the circumstance that the two designated parallel end lines if extended would not embrace the Gilt Edge claim, it must follow that inasmuch as the vein did not cross the designated south end line at all, it must have crossed a side line. It extended the full length of the claim, passed out of it somewhere, and must therefore have crossed some boundary. We invoke this case as conclusive of our rights, whether it be regarded as deciding that the Iron Silver Company could not proceed upon the Stone vein beyond its boundaries because it crossed two non-parallel end lines or because it crossed one end and one side boundary or both. It certainly does not countenance the contention that where a vein crosses one end line of a location the locator may follow it to the extent of the course of the apex falling within the claim; nor can any decision, State or Federal, be found which does.

Coming now to the criticisms offered by the supplemental brief to the other decisions relied upon, and to those advanced by appellee in its own behalf, we may say frankly as to the latter, that the lower courts seem disposed to hold that extra-lateral rights do attach to veins intersected by an end and a side line where the end lines are parallel or converge. Those which arose under the act of 1872 are apposite; the others are hardly analogous. It is because of these cases, we think, that counsel want the common boundary between the Last Chance and New York claims to be considered as a side line of the former, and it must be so treated if they are to become relevant; for it is to be observed that, with the exception of Judge Hallett's opinion in the case at bar, *it has never been held that a vein crossing an end line and a so-called side line could be followed beyond its boundaries when the so-*

called second end line was located on previously appropriated territory, and we do not believe it ever will.

For if this second end line be so potent in determining rights to a vein which crosses its companion line at the other end, the latter certainly should possess reciprocal powers. *Suppose, therefore, that the Last Chance vein crossed its so-called south end line within the New York boundaries, and then crossed the Last Chance east side line on the latter's undisputed territory.* Could not counsel with equal force contend that the vein crossed one end line of the location, and therefore "the locator would own as much of the vein at any depth as he owned of its apex," &c.; ? and would not their citations be equally conclusive ?

It will be remembered that Judge Hallett said at the original hearing that he could "easily conceive of a piece of ground being in a situation on account of other locations adjacent to it which would call for pretty nearly all the lines, both end lines and side lines, being upon other claims;" and such a location would be just as effective as to the territory actually acquired as though the lines were not private property. Such conditions would require the legal creation of two end lines in order to perfect the claim or all our notions of topography are misleading. This, it is decided, cannot be done.

Counsel call attention to the remarks of Justice Miller, at *nisi prius*, in the case of Stevens *vs.* Williams (*pp. 9, 10, supplemental brief*). In that case the defendant contended that from the underground developments on the vein in controversy it appeared that the Iron Mine location of the plaintiff was not at right angles to the dip, but at one of about 45 degrees thereto; hence it was contended that the right to follow it did not belong to the plaintiff. This involved the position of the strike to the end lines, and Justice Miller's remarks have reference to the general course of the vein north and south, which was its strike, and its course or beginning and ending on the east and west, which was its

dip. It certainly is not the law since the Amy-Silversmith decision that "if a locator happens to strike out diagonally, so far as his side lines include the apex, so far can he pursue it laterally," for in that event the particular lines crossed by the apex would become unimportant. All the other cases cited by counsel in their last brief have been heretofore commented on, and we will not indulge in unnecessary repetition.

III.

The third proposition for which counsel contend, and which they support with both argument and illustration, is that "where several overlapping claims are located along the apex of the vein, the senior claimant holds as much of the vein at any depth as he holds of the apex within his location. The next in rank holds as much of the vein at any depth as there is of its apex within his location, except as to the portion thereof owned by the first in rank, and so on with subsequent claimants" (*p. 28, appellee's first brief*).

Counsel think "this proposition to be a necessary outgrowth of the preceding discussion." Perhaps it is; for if a man is once recognized to have a right to go upon his neighbor's private mining property and relocate it in whole or in part, it is extremely difficult to place any limitation upon the consequences. If 1,500 feet of the apex of a vein is subject to half a dozen locations, there is no reason why it may not become a center for the radiation of extra-lateral rights in every conceivable direction. Like the north pole, all lines leading from it must be to the south, although they may run in opposite directions; and such a rule would no doubt prove an universal solvent of mining difficulties, for, as counsel declare, "it would certainly meet every possible condition that may arise in the conflict of ownership in mining claims as to extra-lateral rights on the dip of the same vein" (*p. 28, first brief*).

If the location of the Last Chance claim, "the next in rank," holds as much of the vein at any depth as there is of its apex within the Last Chance location except as to the portion thereof owned by the New York, "the first in rank," it must follow that the appellee owns 1,500 feet of the vein at any depth except in so far as the senior claim of the New York location to a part of this 1,500 feet may diminish such ownership. That diminution in turn depends entirely upon the extent of the overlap of the two claims and the relative position of their end lines; for the point at which they intersect and pass through each other is the point or place at which the intercepted Last Chance ownership recommences. This process of beginning, interruption, and reassertion is described with charming *naiveté* by counsel at pages 29 to 32, inclusive, and we are informed that it is for this reason that "the method of conveyance adopted by the Land Department" exists, that being "the only method by which it can be accomplished." Thus it is said the Last Chance patent describes first the entire rectangular tract marked "survey lot 7263 A," after which it expressly excepts that portion of the *ground* (the italics are theirs) embraced in survey No. 7406, the New York claim, and excepts also that portion of the Last Chance vein and of other lodes and ledges throughout their entire depth, *the tops or apexes* of which lie *inside of the excluded ground* (p. 33). Just how these veins and portions of veins throughout their entire depth can be excluded and still remain the property of appellee in anywise, whether in whole or in part, we are not informed except by the reservation of two "howevers" in as many sentences. "We have already shown, *however*, that for instance on figure B the portion of the vein in controversy which apexes within the New York is marked by the letters *j j, k k*. *Therefore*, it is only the part represented by that figure which is excepted from the section of the lode granted to the Last Chance" (p. 33). Therefore, it must

also follow that the extent of the vein given to the Last Chance increases in width as it descends into the earth!

"The grant, *however*, proceeds near the top of page 6 of the Record as follows: 'Said lot No. 7263 A (Last Chance location), extending 1,278.34 feet in length along said Last Chance vein or lode, *the granted premises in said lot* containing five acres and twenty-five hundredths of an acre, more or less.' So we have here a distinction between the *survey lot* and the '*granted* premises,' the latter referring to the surface acreage, while the lode which is conveyed is described as extending the full length of the rectangular location, excepting that part apexing within the excluded surface" (p. 33, 34). The learned counsel, however fallacious, are generally very clear. Just how this statement becomes applicable to their contention is not apparent. The confusion increases when our references to Mr. Washburn are admitted and followed by the query as to what is left to the Del Monte (p. 35).

The Del Monte is entitled to everything within its vertical boundaries save lodes apexing outside of them and which have been so appropriated by others as to give them a right of entry.

Mining Company *vs.* Cheesman, 116 U. S., 533.
Iron Co. *vs.* Elgin Co., 118 U. S., 196.
Leadville M. Co. *vs.* Fitzgerald, 4 Morrison M. R., 380.
Cheesman *vs.* Shreve, 37 Fed. R., 36.
Catron *vs.* Old, 23 Col., 433.
Doe *vs.* Waterloo M. Co., 54 Fed. R., 935.
Jones *vs.* Prospect Mt. T. Co., 21 Nev., 339.

The question is not what the Del Monte claim possesses, but what right within its lines the appellee may have. This query of counsel suggests the suspicion that they are endeavoring to try two cases here; for they are counsel for the New York as well as for the Last Chance. In the controversy between the Del Monte Company and the

New York Company, the latter claimed the right to pursue the vein between its south end line and a so-called compromise line parallel with the Last Chance end line, and drawn at the point where the vein passes from the New York into the Last Chance territory. (See 66 Fed. R., 212.) These two lines diverge as they are extended westerly, thereby leaving a constantly widening space through Del Monte territory. They were not permitted to do this, but if counsel can impress this Court with the soundness of their present views, the Last Chance may take what the New York has thus far failed to secure. The decision in the New York case is quoted by counsel (p. 21) in support of its side and end line contention. We may remind the Court that it is an unqualified denial of their claim to take everything below the intersecting priority of the New York.

Indeed, every case on the subject limits extra-lateral rights on the dip to the line traversed by a superior or senior extra-lateral right. Beyond such line it has absolutely no existence. In addition to the case just quoted we refer to Tyler Mining Co. *vs.* Sweeney, 79 Fed., 277; Last Chance Co. *vs.* Tyler Co., 79 Fed. In Tyler Co. *vs.* Sweeney, 54 Fed., 284, Judge Hawley said:

"In cases of controversy where the right exists under each valid location to follow the lode in its downward course, it necessarily follows that both locations cannot rightfully occupy the same space of ground, and in all cases where a controversy of this kind arises the prior locator must prevail, precisely as in cases of like controversy between locations overlapping each other lengthwise on the course of the lode."

This doctrine is practically assumed by Mr. Justice Brewer, speaking for the Court, in Last Chance Co. *vs.* Tyler Co., 157 U. S., 687. (See 2 Lindley on Mines, sec. 609.)

If the appellee has the right, as shown by its diagrams (*Figs.* 1, 2, 3, *and* 4, *first brief*) and the argument of its counsel, to as many feet on the dip of its vein as it has of the

apex in its location calculated from end line to end line on the surface, after other prior rights are satisfied, it is because such right is given by the statute. It therefore is of universal application, and as self-evident in a case like figure 4 as in any other. In such a case, however, the Last Chance would have no right of way either through the 1,500 feet of New York vein on the dip or the 150 feet of Del Monte vein on the dip. Yet it must have both or its ownership is worthless. It cannot condemn the right, for it is a private corporation and the use is a private one. It has no such right at common law. It has no such right under the statute, for that gives one only to the junior owner of one of two veins intersecting each other on their dip. It cannot go upon the surface of the ground above the place where its ownership reasserts itself and sink down to or upon it, for the statute forbids an entry upon the surface of another claim for any such purpose.

It will be observed also that appellee's claim disregards the rights of junior locators on the extension of the vein beyond the point where the two or more claims overlap each other on its apex. For since the end lines of a claim, although required to be parallel, need not be at right angles to the vein, but may take any direction (1 Lindley, 365), and since appellee's contention, to be at all practical, must relate to overlapping claims on the same vein with end lines differing on each claim from the others, it follows that three or four such locations could be so made over a surface for the most part common to all of them; that extra-lateral rights might be acquired both ways beyond such surface, notwithstanding the rights of other junior locations upon the extensions of the vein.

To illustrate this we beg to refer to the plat marked "B" and appended to this brief. It represents a vein running east and west on which have been located six claims. Nos. 1 and 2 were located first, Nos. 2 and 3 next, and Nos. 5 and 6 are junior to all. Nos. 1 and 2 are 300 feet apart

with end lines due north and south. Their owner, however, in obedience to appellee's contention, has located two additional claims on the 300 feet of space between the older ones by extending the end lines of No. 3 southwesterly and those of No. 4 southeasterly across the apex of the vein. He has also made each of them 1,500 feet long by running the north side lines within and the south side lines just without the older locations. The westerly end line of No. 3 and the easterly end line of No. 4 are entirely within the boundaries of Nos. 1 and 2 respectively, and the southwest corner of Nos. 1 and 3 and the southeast corner of Nos. 2 and 4 are identical. Claims 3 and 4 are patented, with the same exceptions appearing in the patent of the Last Chance. Under counsel's assertion, Nos. 1 and 2 take all of the vein to any depth within their end lines as extended on the plat. Nos. 3 and 4, "the next in rank," take all of the vein within their end lines extended to any depth, "except as to the portion thereof owned by Nos. 1 and 2," and this "meets every possible condition that may arise in the conflict of ownership in mining claims as to extra-lateral rights on the dip of the same vein."

But after the making of these locations, which reach down with the arms of Briareus, encompassing everything within the widening scope of their rapidly diverging lines, another citizen of the United States goes upon the unoccupied public domain immediately to the east of No. 2, and immediately to the west of No. 1, and there he locates claims Nos. 5 and 6, respectively, on the apex of the same vein and in conflict on the surface with no one. Under the law these last locations represent to their owner the exclusive right of possession of all the surface included within them and of the vein thoughout its entire depth and within the end lines extended in their own direction; but under the new dispensation *two other claims located over and upon previously appropriated premises* assert extra-lateral rights on the very threshold of these, and continue the encroachments across

their pathway until their rights are destroyed utterly. Even then the work of destruction continues, for still other east and west locations may have been lawfully made on the course of the vein and their extra-lateral rights in turn are cut off by this new system of subterranean piracy. It is, indeed, calculated to "meet every possible condition that may arise in the conflict of ownership as to extra-lateral rights," and gathers them in even as a hen gathers her brood underneath her wing. If we were selfish enough to exalt our own above our client's interests, we would fervently hope for the establishment of counsel's proposition. The vista of mining controversy and entanglement it opens to the view is practically limitless; and in its near perspective we might easily discern that part of the glittering crest of prosperity's returning wave which is designed for the benefit of mining attorneys only. With Spartan fortitude we nevertheless deny that it is the law, and we feel quite sure the Court will be of the same opinion.

Our friends, in closing, refer to the conditions of the Del Monte patent, and insist that by its very terms appellant "took its title subject to the right of the owners of the Last Chance vein to follow that vein upon its dip under the surface of the Del Monte and to extract and remove the ore therefrom" (*p.* 25, *supplemental brief*).

The conditions of the patent to the Del Monte are conceded. They are the same which are inserted in all patents for lode claims. They conserve the right of the Last Chance owners to go underneath the Del Monte only when they have shown compliance with all the requirements of the law. Being the owner of the surface, it is presumed that appellant is the owner of everything underneath it.

Mining Co. *vs.* Campbell, 17 Col., 267.

Cheesman *vs.* Shreve, 37 Fed., 36.

Cheesman *vs.* Hart, 42 Fed., 98.

Leadville Co. *vs.* Fitzgerald, 4 Morrison, 380.

In the language of Judge Hawley, we may say, " Hands off of any and everything within my surface lines extending downward vertically until you prove you are working upon and following a vein which has its apex within your surface claim," and, we may add, so located with reference to your lines that you may follow it underneath ours.

The claim by appellee of anything except " the ores situated in the Last Chance vein and lying between the two vertical planes, one drawn through the north end line of the Last Chance and the other through the north compromise line," to which appellee, after all its speculation, finally returns (page 25, last brief), is the only one it presented to the trial court. It is the only one which under its answer we think it has the right to make, and it is surely the only one which the trial court pretended to recognize. It has failed to establish that one by its appeal to end lines within another location, to the theory that the New York side line is its side line as well, to the plea that one end-line crossing is sufficient, or to the suggestion that, although courts cannot make two new lines for a locator, nevertheless they should make one. We therefore, in conclusion, assert that the answer to the queries of the court of appeals should be:

1. The lines of a junior lode location cannot be laid upon, within, or across a *valid* senior location for any purpose.

2. The patent of the Last Chance Lode mining claim, which first describes the rectangular claim by metes and bounds and then excepts and excludes therefrom the premises previously granted to the New York Lode mining claim, convey to the patentee nothing more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim.

3. The easterly side line of the New York Lode mining claim is an end line of the Last Chance Lode mining claim within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States.

4. If the apex of a vein crosses one end line and one side line of a lode mining claim located thereon, the locator has no extra-lateral rights on said vein. This is especially applicable to the Last Chance claim if the easterly side line of the New York is to be considered a side line of the Last Chance as well, for the latter in that case can have but one end line and the required parallelism becomes impossible.

5. On the facts presented by the record herein the appellee has no right to follow its vein downward beyond its west side line and under the surface of appellant's premises.

We sincerely apologize for trespassing so long on the patience of the Court, but the importance and novelty of the problems involved have made brevity impossible.

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Solicitors for Appellant.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

No. 147.

Appx. to Br. of Thomas W. Bickett for Appt.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Dec. 16, 1897.

No. 147.

THE DEL MONTE MINING AND MILLING COMPANY, APPELLANT,

vs.

THE LAST CHANCE MINING AND MILLING COMPANY.

OPINION OF JUDGE HALLETT IN CASE OF STRATTON vs. GOLD SOVEREIGN MINING AND TUNNEL COMPANY ET AL.

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

IN THE CIRCUIT COURT.

W. S. STRATTON
vs.
THE GOLD SOVEREIGN MINING AND TUNNEL COMPANY, *a Corporation, et al.* } No. 3662.

ON MOTION FOR INJUNCTION.

Opinion by Hallett, J. (Orally).

This is a bill to restrain the respondents from driving a tunnel through a mining location in Cripple Creek district, owned by complainant, and called "John A. Logan."

Respondents are proceeding under a tunnel location made March 30, 1892, under the laws of the State of Colorado, section 2323, Revised Statutes of the United States. Complainant's location was made September 5, 1891, and is therefore of earlier date than the tunnel location. April 13, 1895, a patent was issued for the claim, and thus all questions affecting the validity of the location were put at rest.

Respondents have answered the bill, saying that they claim the right "to the possession of all veins, lodes, or ledges within three thousand feet from the face of said tunnel on the line thereof not previously known to exist, discovered in such tunnel to the same extent as if discovered on the surface, as guaranteed to them, as under and by virtue of section 2323 of the Revised Statutes of the United States."

In another part of the answer the following averment occurs:

"They admit that they will, unless prevented by the orders of this honorable court, continue the prosecution of work upon said tunnel for the purpose of claiming 1,500 feet in length upon all lodes, veins, or ledges discovered therein not appearing at the surface and which have not been discovered prior to the location thereof."

Thus it appears that the tunnel is being driven by respondents for the purpose of discovering lodes in the line thereof, and that they intend to assert title to such as may be discovered in the tunnel under the act of Congress within complainant's location and elsewhere. Whether this may be done as against a valid location on the surface of earlier date than the tunnel location is the question at issue between the parties.

Chapter 6, title XXXII, of the Revised Statutes of the United States relates to the mineral lands of the public do-

main of the United States. Section 2319 of that chapter is as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2320 provides for the location of lode claims and the extent and character of such claims.

Section 2322 provides that the locators of claims pursuant to section 2320 shall have the exclusive right of possession and enjoyment of the surface and of all veins throughout their entire depth, the tops or apexes of which lie inside their surface lines, which includes all ore within the claim excepting such as may outcrop in adjacent territory and pass with other locations. When properly made, according to law, a location is segregated from the public domain and becomes the private property of the locator.

Noyes *vs.* Mantle, 127 U. S., 348.

During the lawful occupancy and enjoyment of the locator, or when he shall obtain from the Government a patent, nothing can be done within the claim which shall be or become the basis of another location.

Gwillim *vs.* Donnellan.

Chapter 6 of the Revised Statutes provides for three kinds of locations on the public mineral lands, which, in common speech, are called "lode locations," "tunnel locations," and

"placer locations." When a location has been properly made in either class, and so long as it shall be fully maintained by use and enjoyment or by patent, the territory embraced in such location is not subject to adverse location by a claimant of the same class or any other class. The reason is that the territory covered by such location has been severed from the public domain and has become private property, which is no longer open to a new appropriation. If the locator shall fail to maintain his claim in the manner prescribed, the territory covered by it will revert to the public domain and again be subject to location by the same or a new claimant. Assuming the John R. Logan location to have been well made in the month of September, 1891, and maintained thereafter, the grantors of respondents could not afterwards locate the same territory by a tunnel or in any other way.

The parties to this suit have each assailed the other location with a view to gain precedence, as not having been made in the time and manner set out in the certificates of record under which they respectively claim title. In the practice of the Court such matters are usually reserved for a better consideration at the final hearing.

In the decision of the present motion for the preliminary injunction we accept the date given by complainant to the Logan location in September, 1891, and also respondents' earliest date for the tunnel location in March of the following year.

In the answer to the bill respondents declare that the discovery and location of veins on the line of the tunnel is not the only purpose for which the tunnel is to be made; the corporation respondent owns claims adjacent to the Logan location which it desires to penetrate and develop by means of the tunnel. It is also expected that veins will be cut on the further side of the Logan location, which respondents will be able to acquire, if permitted to drive the tunnel

through and beyond the territory of the latter. The questions which are thus suggested relate to a right of way through property owned by the corporation respondent, and for making discoveries in the public domain elsewhere outside the limits of the Logan location. So understood, the questions are not germane to the principal issue in the case, but are inconsistent with it. So long as respondents assert the right to take the ores of the Logan location through and by means of their tunnel they cannot be heard to say that they have not such intention, but their purpose is to go beyond in search of greener fields and pastures new.

Another proposition is earnestly advocated by respondents: That the case is not of equitable cognizance, inasmuch as nothing of value has been found in the tunnel within the limits of the Logan location. Counsel is correct in saying the Court will not enjoin a trespass on a mining claim unless it appears that the value of the complainant's estate is menaced. That rule has been often recognized in this jurisdiction, when the alleged trespasser had departed from his own claim in pursuit of a vein of which he held the outcrop. In such cases the Court has said: Peradventure the trespasser will find nothing and we shall escape from the vain contentions of these people. The injured party may properly be left to his action at law for such damages as may have resulted to him from blasting a hole in the solid granite of the mountain.

The case at bar is different. Complainant alleges that he has discovered good ore in his Logan location, and that respondents intend to assert title to it whenever they can reach it through and by means of their tunnel.

In any view that may be taken of the controversy an action at law would not afford adequate protection to complainant's interest in the claim.

The Rico-Aspen case, reported in 167 U. S., was the sub-

ject of much comment at the bar, but it does not appear to have any bearing upon any question presented in the record.

The motion for a preliminary injunction will be allowed, and the order will stand until otherwise directed.

Rendered December 6, 1897, 10 a. m.

[Endorsed:] Case No. 16,237. Supreme Court U. S., October term, 1897. Term No., 147. The Delmonte Mining & Milling Co., app't, *vs.* The Last Chance Mining & Milling Co. Opinion of U. S. circuit court for district of Colorado in case Stratton *vs.* The Gold Sovereign Mining & Tunnel Co. *et al.* Filed Dec. 16, 1897.

No. 147.

Brief of Wolcott & Vaile for Appellee

IN

Filed Dec. 1, 1897.

THE SUPREME COURT

OF THE

UNITED STATES.

THE DEL MONTE MINING AND MILLING COMPANY, *Appellant*,

vs.

THE LAST CHANCE MINING AND MILLING COMPANY, *Appellee*.

No. 147.
(16,237.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

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IN

THE SUPREME COURT

OF THE

UNITED STATES.

THE DEL MONTE MINING AND MILLING COMPANY,
Appellant,
vs.
THE LAST CHANCE MINING AND MILLING COMPANY,
Appellee.

No. 147.
(16,237.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT.

The relative positions of the surface boundaries of the several mining claims to be considered in this controversy are shown on Exhibit "A," facing page 10 of the printed record.

The mineral deposit here in dispute lies at great depth under the surface of the Del Monte claim (lot 7,356), and on the dip of a vein which

has its apex in the Last Chance claim (lot 7,263A); it also lies between two parallel vertical planes, indicated by dotted lines on said Exhibit "A;" one of said planes being drawn downward through the north end-line of the Last Chance claim extended westerly, and the other drawn downward through what is called the "north compromise line," as shown on Exhibit "B" in the record. This north compromise line is drawn approximately through the point where the apex of the vein, in its southerly course, passes out of the patented *surface* of the Last Chance claim.

By an examination of Exhibit "B" in the record, it will be seen that certain of the Last Chance workings are within the disputed territory, to wit: parts of the fifth, sixth and seventh levels, and all of the eighth and ninth levels. The same Exhibit reveals the fact that the vein, in its downward course, passes the vertical east boundary of the Del Monte claim, and, therefore, passes under the Del Monte surface at an elevation (662.2 feet) 467 feet lower than the collar of the Last Chance main shaft (1,129.7 feet), and 672 feet lower than the surface at the Del Monte shaft (1,334.6 feet). The vein rapidly descends to greater depths as it penetrates Del Monte territory.

The ultimate question for solution is, whether the appellee, as the owner of the patented Last Chance claim, or the appellant, as the owner of the patented Del Monte claim, is entitled to that part of the Last Chance vein lying under the Del Monte surface and between the two vertical planes above described.

As factors in this problem, the Circuit Court of Appeals submits the following

QUESTIONS.

"1. May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location, for the purpose of defining for, or securing to, such junior location underground or extralateral rights not in conflict with any rights of the senior location?"

To this question the appellee would answer "Yes."

"2. Does the patent of the Last Chance lode mining claim, which first describes the rectangular claim by metes and bounds, and then excepts and excludes therefrom the premises previously granted to the New York lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted *surface* of the Last Chance claim?"

To this the appellee would answer "Yes."

"3. Is the easterly *side* of the New York lode mining claim, an "end-line" of the Last Chance lode mining claim, within the meaning of Sections 2320 and 2322, of the Revised Statutes of the United States?"

To this question, the appellee would answer "No."

"4. If the apex of a vein crosses one end-line and one side-line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side-line of his location?"

To this the appellee would say: "Yes, to any depth, and at least for such horizontal length, measured from the vertical plane of his end-line, as he has horizontal length of apex within his location."

"5. On the facts presented by the record herein, has the appellant the right to follow its vein downward beyond its west side-line and under the surface of the premises of appellant?"

The appellee contends that this question should be answered, "Yes."

BRIEF AND ARGUMENT OF APPELLEE.

There is no difference between the parties to this controversy as to the facts upon which the case must be determined; there is a radical difference between them as to the law applicable to the facts.

With very great respect for the learning and ability of the counsel for the appellant, we nevertheless must venture the opinion that they are seeking to revolutionize certain principles of mining law, and to deprive the discoverers of mineral veins of the benefit of their discoveries, and transfer such benefit to surface owners of adjacent claims who are not discoverers, but who would thereby reap the reward of the diligence, skill and success of their neighbors.

The principal fallacy in the argument of appellant results, as we think, from ignoring the plain provisions of the statute of the United States, relating to mining locations, and in applying to the boundaries of *patented surface* those principles which the law applies to *lines of location.*

The diagram annexed to this brief and marked "Fig. A" correctly shows the true relations of the boundaries of the Last Chance, the Del Monte and the New York lode mining claims, and also illustrates the portion of the vein in controversy.

The appellee, as the owner of the Last Chance

claim, owns the apex of the Last Chance vein, from the north end-line of said claim, southerly to the New York claim, and it claims to own as much of the vein, for its entire depth, as it owns of the apex. The trial Court held this contention of the appellee to be well founded.

In "Fig. A," the portion of the apex owned by the appellee is shown by the line *m—x;* the fine parallel lines represent the descent of the vein into the earth and under the surface of adjacent property; the letters *m—x* and *n—y* will show the portion of the vein claimed by the appellee; the portion thereof now in controversy is that which lies under the surface of the Del Monte claim. The Del Monte has no portion of the apex of the vein within its surface boundaries.

It may be stated, in passing, that the line *x—y*, designated in the record as the "north compromise line," became the southern boundary of the appellee's claim of ownership on the dip of the vein, as the result of contracts and conveyances between the owners of the Last Chance, on the one part, and the owners of the New York on the other part. (See *Del Monte M. and M. Co. vs. New York and Chance Mining Co.*, 66 Fed. Rep., 212.)

In discussing the questions propounded by the Circuit Court of Appeals, we venture to lay down three distinct propositions, to which we shall address our argument, and which we think are well founded in law. Even if the second proposition alone be decided in our favor, it ends the present controversy; but in order that we may meet the various theories presented by the counsel for appellant, we shall discuss each of the three.

By the word "location" or "claim," as used in the following discussion, we mean all that is included within the exterior boundaries of the "sur-

vey lot," without any exclusion in favor of senior appropriators. It is a familiar fact that the "first" or "original" location of a claim may be loosely and inaccurately laid; but the location may be amended or revised, and the "location," in its final form, just preceding application for patent, including all that the locator would be entitled to hold if there were no overlapping senior claims, is the "location" here referred to. Such "location," or "claim," may equal, but cannot exceed, 1,500 feet in length along the vein or lode, and its surface cannot (in Colorado) exceed 300 feet in width.

The propositions we would lay down are as follows:

(1) What are the "end-lines" of a lode mining claim, is to be determined, not by the lines of *patented surface*, but by the lines of the claim *as located*.

(2) If the apex of a vein enters a *location* across one end-line thereof, the locator will own as much of the vein, at any depth, as he owns of its apex, *subject only to superior rights of other apex claimants*.

(3) Where several overlapping claims are located along the apex of a vein, the senior claimant holds as much of the vein, at any depth, as he owns of the apex within his location. The next in rank holds as much of the vein, at any depth, as there is of its apex within his location, *except as to the portion thereof owned by the first in rank*, and so on with subsequent claimants.

We shall take these propositions up in the order here presented:

I.

What are the "end-lines" of a lode mining claim, is to be determined, not by the lines of patented surface, but by the lines of the claim as located.

It is apparent, not only from the "reason of the thing," but from the very letter of the statute, that in the grant of lode mining claims, the substance of the grant is the mineral-bearing vein; that the grant of surface is merely accessory and incidental and for the purpose of making more available the grant of mineral beneath the surface.

"No location of a mining claim shall be made until the discovery of a *vein or lode* within the limits of the claim located."

Revised Statutes, Section 2320.

"A mining claim * * * may equal, but shall not exceed, fifteen hundred feet along the *vein or lode.*" (*Ib.*)

No mining claim can take more than three hundred feet, or be restricted by local regulations to less than twenty-five feet "on each side of the *middle of the vein* at the surface." (*Ib.*)

"The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment," not only of the surface within the lines of their locations, but also of "all veins, lodes and ledges throughout *their entire depth*, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

Revised Statutes, Section 2322.

These words of the statute plainly show that

its purpose is to grant the *mineral* contained in veins, to whatever depth they may descend, and to a limited horizontal extent.

This Court plainly recognizes this clear intention of the statute, when it says:

"Our laws have attempted to establish a rule by which each *claim* shall be so many feet of the *vein* lengthwise of its course, to *any depth* below the surface, although laterally its inclination shall carry it ever so far from a perpendicular."

Mining Co. vs. Tarbet, 98 U. S., 468.

This Court again says:

"A section of the *lode* within vertical planes drawn downward through the lines *marked on the surface* was designated as the grant to the original locator, but as the vein in its downward course might deviate from a perpendicular and pass out of the side lines, the right was conferred to follow it outside of them, but within planes through the end lines drawn vertically downward and continued in their own direction."

Iron Silver Mg. Co. vs. Elgin Mg. Co., 118 U. S., 205.

It is equally apparent from the nature of things and from the statute, that the lines which shall furnish the basis for defining and limiting underground rights, must be laid upon the surface.

The claim cannot exceed fifteen hundred feet along the vein or lode, nor be more than three hundred feet (in Colorado, 150 feet) on each side of the middle of the vein "at the surface."

Revised Statutes, Section 2320.

"The end-lines of each *claim* shall be parallel to each other." (*Ib.*)

Extra-lateral rights on veins, lodes or ledges

are "confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the *end lines* of their *locations* so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

Revised Stats., Section 2322.

This Court has said:

"This means the end-lines of the *surface location*, for all locations are measured on the surface."

Iron Silver Mg. Co. vs. Elgin Mg. Co., 118 U. S., 206.

A slight examination of the statute also clearly shows that when the statute requires, in Section 2320, that "the end-lines of each *claim* shall be parallel to each other," it means the end-lines of each claim *as located;* or, in other words, the end-lines of the *location* shall be parallel. And for the purposes of ascertaining the surface lines which determine rights, the word "location" and the word "claim" in the statute must be taken as synonymous.

Thus, the statute having provided, in Section 2320, that the end-lines of each *claim* shall be parallel to each other, then proceeds, in Section 2322, to define the rights of "the locators of all mining *locations*," giving them the "exclusive right of possession and enjoyment of all the surface included within the lines of their *locations*, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines [that is, of the *locations*], extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface *locations;* but

their right of possession to such outside parts of such veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end-lines of their *locations*, so continued in their own direction that such planes will intersect said exterior parts of such veins or ledges."

Certainly, there is no room for debate on the proposition that the end lines of the "location," referred to in Section 2322, are the end-lines of the "claim," which, by Section 2320, are required to be parallel to each other.

These parallel end-lines, therefore, are those which mark the terminal boundaries of the claim as asserted by the locator and as marked upon the ground. They limit both his surface and his underground rights, but are necessarily and of course subject to any superior rights, either on the surface or underground, possessed by another; which, as we shall hereafter show, is the reason why, in the form of patent used by the Land Department of the United States, the descriptions are made by way of *exclusion* of prior grants.

The statute very plainly recognizes a distinction between the claim as located, to which alone all provisions relating to end-lines apply, and the surface that shall be subsequently patented. When we turn to Section 2326, Revised Statutes, this distinction becomes very apparent. In the location of mining claims, as a result of the requirement that locations shall have parallel end-lines, and because the validity of conflicting locations is, for some time after attempted discoveries, a question of uncertainty, mining locations do overlap each other in all conceivable directions. A mere glance at a map of the mining locations of Leadville, of Aspen, of Creede, or Cripple Creek, or of

any other mining camp, will show how the locations, and even the officially surveyed locations, do thus conflict one with another, sometimes several locations covering the same surface area.

This necessary consequence of the requirements of the statute as to the way of locating mining claims was recognized by the law makers in providing for the settlement of adverse rights, in which a clear distinction is made between the claim as located and the surface as patented. If a locator makes application for his entire claim as located, and other persons are claiming the same territory, or a portion thereof, the law provides for the institution of adverse proceedings to determine by judicial action the right of ownership; and in such cases it is provided in Section 2326 of the statute, that "a patent shall issue * * for the *claim*, or such *portion thereof*, as the applicant shall appear, from the decision of the Court, to rightly possess. If it appears from the decision of the Court that several parties are entitled to *separate and different portions* of the *claim*, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Surveyor General, whereupon the Register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office * * * and patents shall issue to the *several parties* according to their *respective rights*." Now, Section 2320 had provided that the end-lines of *claims* should be parallel to each other; Section 2322 had provided that the extra-lateral rights should be bounded by vertical planes drawn through these parallel end-lines of the claim, all referring to the *location* and the extent of claim as marked by the locator; and the provision in relation to patents provides that this claim may, for

purposes of patenting, be cut up into parts, so that one portion may be patented to one and another portion may be patented to another. It is an axiom that a part cannot equal the whole, and there is nothing in the statute, from beginning to end, which applies to boundaries of the patented fragments of surface, the rule requiring parallelism in end-lines; nor is there anything to be found in the statute which applies to the lines of patented surface the rules which control the lines of location.

The principles which we have been here presenting and discussing are well illustrated by the particular case in hand. The located claim called the Last Chance is a rectangle, having absolutely parallel end-lines, and being described as survey lot 7263 A. This is manifestly a location and a claim to which the rule as to parallelism in end-lines applies. It applied for patent for the entire surface area included within its rectangular survey lot. The owners of the New York were claiming a portion of the same territory included within the Last Chance claim. They brought an adverse proceeding under Section 2326 of the Revised Statutes. Litigation was had upon the subject, and as a result of the litigation, a *portion* of the Last Chance *claim* was awarded to its locators, and the *portion* of the claim so awarded to them was patented. The ownership of the located claim, however, was not thereby reduced, either as to surface or vein, *except* to the extent of the portion awarded to the New York.

As we shall hereafter see, upon another branch of the subject, the law and the patent gave to the owners of the Last Chance all rights which their location of survey lot 7263 A (being the entire rectangle with parallel end lines) would give them, except that which, by the law and by the patent,

was excluded in favor of the New York lode mining claim, which had instituted such adverse proceedings.

It is very apparent that, in the absence of any adverse proceedings, the Last Chance application for patent would have taken the whole rectangle which marks the location of the Last Chance, together with the entire vein, to any depth below the surface, and for the full distance, horizontally measured, from end-line to end-line of the Last Chance location. The New York, however, is an adverse claimant to a part of the property for which the Last Chance was making application for patent. The New York succeeds, and, to the extent that the adjudication goes in favor of the New York claim, there is an exclusion in the patent from the property which would otherwise be conveyed to the Last Chance.

It is argued very strenuously by counsel for appellant that "the end-lines of a lode mining claim are those which lie crosswise of the apex of the vein," and that "they must be actual and not imaginary;" by which last expression counsel mean that they must lie upon previously unappropriated surface. The fallacy of the first part of the proposition again lies in the use of the word "claim." We do not for a moment debate the proposition that, where two parallel lines of a claim cross the apex of a lode upon the surface, they are the "end-lines" of the claim, but the *claim* referred to is the *located claim*. Counsel use it in the sense of the patented surface. But the statute clearly shows that patents may apply to *part* of the claim, and that to one may be given a portion of the claim and to another a "separate and different" portion.

The fact that the lines of different locations

cross each other does not make the lines of the junior claim any the less actual. A line itself does not have either breadth or thickness. Its existence does not invade any possession or occupancy of a senior claimant. It is but a method of designation so as to show the limits of *underground* as well as of surface rights; and while, of course, such boundary lines of the junior claimant, so far as they overlap or lie upon a senior claim, cannot and do not take from the senior claimant any right of surface or any possession or enjoyment of surface within the conflict, they may, and generally do, become essential to mark the extent and limitations of underground rights of the junior claimant, which, as to any conflict, are, of course, subject to an exclusion in favor of the senior claimant.

So far as the present case is concerned, the proposition we are here discussing is not affected by the statutory provision that one who has appropriated a portion of the public mineral domain and complied with the mineral laws, has the "exclusive right of possession and enjoyment of all the surface included within the lines of his location." This has never been held in practice to prevent the entending of a survey over previously appropriated territory for the purpose of defining a second location, which second location is of course subject to an exclusion in favor of the first locator. Even if it were true that the owner of patented surface might, under this statute, prevent a subsequent locator from even planting a stake upon the patented surface for the purpose of marking the limits of underground rights, which may not be adverse to the rights of the senior patentee, yet such a question is not involved in the case at bar, nor is it in practice a difficulty which locators have to contend with. In the present case, the

locations *were* made; they were surveyed under the authority of the Surveyor General; there is no question as to the extent and boundaries of the claims as located and the question involved here is as to which of certain known lines mark the rights of the contesting parties. The boundaries of the *location* are as well known, and as distinctly described as are the boundaries of the patented surface.

Our contention is, that the boundaries of the recorded and *located claim* (the exterior boundaries of the "survey lot") are the lines referred to in Sections 2320 and 2322; that it is the end-lines of the *location* thus made that must be parallel, and which determine extra-lateral rights, and that the requirement of parallelism has nothing whatever to do with the surface lines which mark the *fragments* of a claim that may be patented to the one party or to another.

We here insert, as it does not appear in the record, the opinion of the Supreme Court in dismissing the bill in the present case, adopting it as a part of our argument, so far as it applies to the question now under consideration. It is as follows:

DECISION DISMISSING BILL.

Hon. Moses Hallett, Judge:

"I think that the lines of a claim may be located wholly or partly upon other territory--that is, territory which is not open to location, for the purpose of determining the extra-lateral questions. In other words, the locator, in order to make a valid location, is bound to locate his lines so as to be of a rectangular form, and, if in so locating them he gets upon the territory of other claimants, whether at the time of such location the claims adjacent

have or have not been patented, his lines are well laid with reference to the territory actually open to that location. As in the case supposed, if the territory subject to location, as the Last Chance, at the time the patent for that claim was issued, had been of triangular shape, I think that in order to acquire that territory the location would of necessity be rectangular, and even if the lines fell upon other claims which had already passed to patent, the result would be the same; so that in this instance the circumstance that a part of each of the side-lines and a part of the south end-line is upon the New York claim is not controlling in the determination of this question.

"We consider, however, under the Last Chance patent the respondent owns the apex, and we can allow the extra-lateral right upon the course of the end-lines within the principle announced in the New York case lately decided. [66 *Fed.* 212.] There is one end-line—the north end-line—which is well located, and the other is to be placed where the vein leaves the location by its apex in the corresponding position in the course of the two end-lines, and the circumstance that the south end-line is in part upon other claims, or wholly upon other claims, does not affect the question of its force and effect as an end-line. We can easily conceive of a piece of ground being in a situation, on account of other locations adjacent to it, which would call for pretty nearly all the lines, both end-lines and side-lines being upon other claims; I think they would still be effective as to the territory actually acquired under the location, although placed upon other claims.

"I comprehend the force of the argument that all lines located upon other claims of earlier date are invalid because they are not upon territory open to location; but I do not believe that to be a correct position. I think that, the act of Congress requiring that a claim shall be of a certain form (and the locator in order to secure the territory which he wants will be compelled to conform to that shape), he may put his lines so as to take the territory to which he may be entitled rather than upon the ter-

ritory itself. I notice in these cases over on the Pacific coast, as the Tyler cases and the like, they have run their lines in the most extraordinary ways, and in many cases they have nothing at all that can be called end-lines or side-lines, which was the same in the "Horse Shoe," or the Stone location; but that has not been the practice in this State; we have always been making the location—always at least since the Act of 1872—we have always been making them rectangular in form, even though it carried the lines upon other locations. Upon that, I think, the case is controlled by the rule which was laid down in the New York-Del Monte case recently, and that the respondent here may claim upon a line parallel to the end-lines where the vein leaves that location. That I understand to be identical with the north compromise line in the New York case; so that no right can be allowed in this case as to the territory north of that line. That, I believe, is what is sought."

II.

If the apex of a vein enters a location across one end-line thereof, the locator will own as much of the vein at any depth, as he owns of its apex, subject only to superior rights of other apex claimants.

Various attempts have been made to refine away the provisions of the statute relating to extra-lateral rights, and to give to claimants of surface possessing no apex of a vein, the benefits resulting from the discovery of such apex within adjacent territory by others; and an attempt is made in this case to deprive the discoverers of the Last Chance claim of the benefit of their discovery, because their vein, after crossing one of the end-lines of the Last Chance and running substantially parellel with its side-lines and along the center of their claim, passes into the territory of a senior claimant across a line which, by reason of the nature

of the location of the senior claimant, cuts the Last Chance claim obliquely. It is apparent that the Last Chance *location* is well laid as regards the vein, and the course which the New York side-line takes across the apex is by reason of the location of the New York, and not by reason of the location of the Last Chance. The east side-line of the New York which marks, by reason of priority of claim, a boundary for the patented *surface* of the Last Chance, was not located by the Last Chance discoverers, nor had they any voice in fixing its direction. It is but an obstacle which interrupts what would otherwise be their right to follow upon the apex of this vein for a further distance of more than six hundred feet within the lines of their claim as laid. Now, our proposition is—and the proposition which was sustained by the trial Court—that the apex of the vein, crossing as it does the north end-line of the Last Chance, and pursuing a course substantially parallel with the side-lines of the Last Chance through the center of that claim, the owners of the Last Chance are entitled to at least as much of the vein in horizontal extent, for its entire depth, as they thus have of its apex.

For the purposes of the argument, however, the question may be discussed without reference to the seniority of a conflict claim, and for the sake of presenting the legal questions involved, we may take "Fig. B," hereto attached, and the line of apex of the New York claim, being the senior claim, for the purpose of determining what the extra-lateral rights are where the apex of the vein does not cross both end-lines. By an examination of "Fig. B," which correctly represents the relative position of the locations, it will appear that the line of the apex of the New York claim, marked by the letters j—j, crosses the southern end-line of the New York,

passes northerly substantially parallel with the side-lines of the New York for four-fifths of the length of the claim, and then passes out of the easterly side-line. Our contention under such circumstances is that the New York claim will have as much of the vein for its entire depth as it has of its apex, and that the lines j—j and k—k will represent the vein upon its dip which is thus held by the New York. The statute relating to rights under these conditions, being Section 2322 of the Revised Statutes, seems so plain as not to require construction. In the language of Mr. Justice Field, "This section appears sufficiently clear on its face; there is no patent or latent ambiguity in it." It is very clear that the statute, under such circumstances, purports to give at least "*all* veins, lodes and ledges throughout their entire depth, the top or apex of which *lies inside* of such surface lines extended downward vertically;" and no distinction is here made between the original discovery upon which the claim was based and the original location made, and other veins which have subsequently been found to apex within the surface; but it would seem to give as much of all such veins, lodes and ledges, for their entire depth, as they possess of apex within their surface lines; this right of possession being always confined to such portions as lie between vertical planes drawn downward vertically through the end-lines. It is very apparent, therefore, that, taking the New York claim for illustration again, no rights on the strike or dip can extend south of a plane j—k drawn through the south end-line of the New York claim; that plane becomes the base for measurement of the rights which the claim possesses. It possesses of the apex within the surface lines, all that portion shown by the line j—j. Assuming that the

line j—j is in horizontal distance eleven hundred feet long, if the northern end line of the claim as located had been drawn at the point j, where the apex leaves the side-line, then no question could arise, but that the figure j—j, k—k would represent the extent of vein on its descent into the earth to which the New York claim would be entitled. Now, upon what principle, either of law or of equity, or under what theory of construction of the statute, can it be said that, because the surface lines extend beyond the northern line j—k, the rights, which would be possessed if it had stopped at the northern line j—k, have been destroyed? The length of the claim *may* equal, but shall not exceed fifteen hundred feet along the lode; there is no minimum limit fixed by the statute; the New York, as located, takes eleven hundred feet along the lode. This certainly is within the right given by the statute. The fact that the remaining four hundred feet of the surface is not *along the lode*, while it may, under certain conditions, and at a certain stage of proceedings, possibly defeat the title to this additional four hundred feet of surface, yet on what principle could it take away the rights of the locator to the extent that the claim *is* located *along the lode*.

We ask the attention of the Court to the case of *Del Monte Mining and Milling Co. vs. New York and Chance Mining Co.*, 66 Fed. Rep., 212, where this very vein of the New York was in controversy between its owners and the present appellant. We submit that the views of the Court in that case are well founded, and are entirely consistent with any decisions made as yet by this Court. The Court, after citing the Flagstaff case and the Amy-Silversmith case, says:

"The most that can be deduced from them is that opposite lines, parallel to each other, when crossed by the lode, shall be end-lines. The case presented is not within the principle of these decisions. We have a lode extending on its strike on the general course of the location and within its side-lines a distance of 1,070 feet. It is conceded that the south end-line of the location is well placed, and all parts of the lode covered by the location are ***within*** the end-lines as fixed by the locator. The difficulty arises from the circumstance that the *location* extends in a northerly direction about 280 feet beyond the point where the lode diverges from the side-line. No reason is perceived for saying that this mistake in the length of the *location* should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end-line at the point of divergence, or elsewhere, because the Court cannot make a new location, or in any way change that made by the parties. * * * This, however, is not necessary. We can ***keep within the end-lines*** fixed by the locator in respect to any extra-lateral right that may be recognized without drawing any line; and if there be magic in the word "line," it will be better not to use it.

"In this instance, as in most controversies between adjacent owners, it is necessary to ascertain what part of the lode is within the New York location, and this, according to the map, appears to be 1,070 feet. *At all points on the dip of the lode into the mountain westwardly we can ascertain the length of the lode within the end-lines by measuring the same distance from the south end-line produced.* In this proceeding there is no departure from the end-lines of the New York location as fixed by the locator, and there is no new line of location drawn for any purpose whatever. We keep entirely within the end-lines of the location, as required by the statute, and the circumstance that we are somewhat short of the north end-line does not in any way affect the principle to be followed in construing the statute."

We respectfully ask the attention of the Court to the full statement of facts and discussion of the subject in this decision by Judge Hallett, which we respectfully insist is a sound enunciation of the law appertaining to the subject.

The question as to extra-lateral rights, where the apex crosses one end-line and one side-line of a location, has not been, in express terms, decided by this Court, and is, therefore, claimed to be an open question; but we respectfully submit it is an "open" question only because, since the Amy-Silversmith case, very vigorous efforts have been made by persons owning surface but not apex, to restrict extra-lateral rights, and because the question presented by them has *not* been expressly decided by this Court. As we look at the matter, it is not a question which should be considered as an open one, because of the plain meaning to be given the statute bearing upon the subject. In the one case in which the question was brought before this Court, the Court said:

"It will be seen from the diagram that according to the original location of the Tyler claim, the vein enters through an end and passes out through a side line * * *. It has been held by this Court in the cases heretofore cited, that where the course of a vein is across instead of lengthwise of the location, the side-lines become the end-lines, and the end-lines the side-lines; but there has been no decision as to what extra-territorial rights exist if a vein enters at an end and passes out at a side-line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law, that the owner of real estate owns all above and below the surface, and no more? Or may the Court rely upon some equitable doctrine, and give to the owner of the vein the right to pursue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines?"

Last Chance Mg. Co. vs. Tyler Mg. Co., 157 U. S., 683, 695.

As we look at the law governing extra-lateral rights, this is a case for which provision has been made by statute, and it is not necessary to rely upon some equitable doctrine, but the extra-territorial rights of the parties rest upon the statute itself, for it is unquestionable that the statute gives an extra-territorial right as to all veins the apexes of which lie *within* the end-lines. It is very clear to our minds that if the apex crosses one end-line and runs within the claim for some considerable distance, such apex is *within* the end-lines, for to be *within* does not necessarily mean that it must also *pass out* of both end-lines. Under the statute, the owner of the claim owns the vein "the top or apex of which lies *inside* of the surface lines." Certainly, the apex of this vein does lie inside the surface lines of the New York, and it would be, in our opinion, a strange modification of the statute, in the nature of judicial legislation, to say that the apex must not only thus lie inside of the lines, but must extend to, so as to pass outside of, the end lines of the claim.

Of course, by the apex of a vein which is to lie inside of the claim, is not meant the whole line or apex of the vein used in a geological sense, because the vein may extend for miles, and by the very terms of the statute the claimant cannot take more than 1,500 feet along it. Therefore, in any view of the statute, it must be contemplated that there is included within the surface boundaries of the claim all or *some portion* of a geological vein which may physically be of greater or less extent. If it is of greater extent than 1,500 feet in length, and both end-lines of the claim cross

it, or two parallel lines of the claim cross it, then such parallel lines mark the portion of the lode or vein which the locator has obtained. If the vein is physically shorter than 1,500 feet, as it well may be, or if less than 1,500 feet of its apex is within the surface lines, entering, however, across one end-line, then certainly the conditions exist which, under the statute, give the right to follow the vein upon its dip under the surface of adjoining territory.

In the very case in this Court which has established that parallel side-lines crossing the course of the apex would become the "end-lines" which bounded the claimant's rights, the Court, nevertheless, used expressions to show that any absolute and certain relation of surface lines to apex was not contemplated by the statute. Thus, in that case, the Court said:

"Slight deviation of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein, but, if it should make a material departure from his location and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein *further than it continued substantially to correspond with it.*"

Mining Co. vs. Tarbet, 98 U. S., 463, 468.

Applying this language to the case of the New York vein, the location is on that lode or vein *so far as it continues substantially to correspond with it.* If the location is on the lode or vein, then the apex of that lode or vein is *within* the location; but if the apex is within the location, the statute gives the right to follow such vein upon its dip under the surface of adjacent territory.

It is to be noted, also, that the extra-lateral

rights given by the statute apply not only to the originally discovered vein upon which the location was based, but to *all* veins, the apexes of which may be within the same surface; but, to anyone at all familiar with mining conditions, it is apparent that such veins will take different courses, and it would be a rare circumstance that different veins within a mining location should all be parallel to each other, and should all cross the end-lines of the location. The Supreme Court has remarked:

"It often happens that the top or apex of more than one vein *lies within* such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side-lines of the location must be bounded by planes drawn vertically through the *same end-lines*. The planes of the end-lines cannot be drawn at a right angle to the courses of all the veins if they are not identical."

Iron Silver Mg. Co. vs. Elgin Mg. Co., 118 U. S., 196, 207.

The only way, we respectfully submit, by which the rights granted by the statute can be made available is, that, as to all of such veins, whatever angles they may take, the locator has at least as much of the vein at any depth, upon its dip as he has of its apex within his surface boundaries.

The Circuit Court of Appeals for the Ninth Circuit has fully sustained our contention upon this subject, using this language:

"The learned justice who wrote the opinion in the Horse Shoe case, when he said that the parallelism of the end-lines 'is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side-lines,' did not mean that it was essential to such right that such lode should extend in its length from *one end-line to the other* of the location.

If the lode in question, instead of extending into the Last Chance location had abruptly broken off within the surface lines of the Tyler near the point where in fact it crossed the line, there could certainly be no question as to the right of the Tyler to follow the lode or vein in its downward course for its entire depth outside of the vertical planes drawn through the side-lines. The fact that it continued its course and crossed the side-line does not in any manner change this principle. In either case the locator is entitled to the same rights."

Tyler Mg. Co. vs. Sweeney, 54 Fed. Rep., 284, 292.

The Judge who wrote the opinion in the last case cited had occasion to decide a similar question on the circuit after the decision of the Supreme Court in the case of *King vs. Amy Silversmith Mining Co.*, in which he held the same views, and that they were not inconsistent with the views of the Supreme Court in the case last mentioned.

See—

Consolidated Wyoming Gold Mining Co., vs. Champion Mining Co., 63 Fed. Rep., 540, 547.

We respectfully insist that, upon the very plain meaning of the statute, and upon the construction given to it by those judges who have had long experience in the construction of mining law, it must be concluded that the first locator along the apex of a vein which crosses one of his end-lines, will be entitled to the possession of the vein to any depth, and to a horizontal extent measured from the vertical plane drawn through such end-line, corresponding to the horizontal extent of the apex, measured from the same end-line, which he has within his surface location.

While this proposition, as thus stated, is true, as to the first locator on the apex, yet, as to a second or subsequent locator, it must be subject to a modification, and that is to an exclusion to the extent of the rights actually possessed by the senior locator.

The appellant, among the various figures used to illustrate its theories in the Court of Appeals, had one designated as "Fig. 3," in which the apex is shown to cross one end-line of the "Del Monte," and to pass out of its side-line, and the apex of the same physical vein is shown to cross the south end-line of the "New York" claim and to pass out of its west side-line near the northwest corner; the "Del Monte" being the senior of the two claims according to the hypothesis suggested. We call attention to the blue-print marked "Appellant's Figure 3, Elaborated," attached to this brief, to illustrate the resultant rights under such circumstances. The line f—f would show the portion of the apex possessed by the "Del Monte" entering the claim across its south end-line. As the senior claim, it would hold as much of this vein upon its dip as it has of the apex, and, therefore, the lines f—f, g—g would mark the portion of the vein in its descent, to which the "Del Monte" would be entitled. If the "Del Monte" claim were not there, the "New York" would be entitled, by virtue of its location, to the full line j—j, showing the apex, and would be entitled to as much of the vein upon its descent into the earth as it has of the horizontal extent of the apex measured from the south end-line; and, therefore, the figure j—j, k—k would represent that which the New York would own if the Del Monte did not exist. The Del Monte, however, in such imaginary case, having certain apex rights, and being senior to the New York,

could not be deprived of the rights granted it, and that portion of the vein possessed by it would be necessarily excluded from the property belonging to the New York. The New York would own all of the vein j—j, k—k, except the strip running crosswise through it, marked by the lines f—f, g—g. We think this is the logical and necessary deduction from the statute, and that our proposition is well maintained, to wit, that "if the apex of a vein enters a location across one end-line thereof, the locator will own as much of the vein at any depth as he owns of its apex, subject only to superior rights of other claimants."

III.

Where several overlapping claims are located along the apex of the vein, the senior claimant holds as much of the vein at any depth as he holds of the apex within his location. The next in rank holds as much of the vein at any depth as there is of its apex within his location, except as to the portion thereof owned by the first in rank; and so on with subsequent claimants.

We think this proposition is a necessary outgrowth of the preceeding discussion, but its enunciation and elucidation are important, and we think that it fully meets every possible condition that may arise in the conflict of ownership in mining claims as to extra-lateral rights on the dip of the same vein.

Using again as a premise the proposition that the essential thing intended to be conveyed to the discoverer of mineral upon the public domain, is the mineral itself, and that a lode to its entire depth is granted to the locator of the vein, limited only by the parallel end-lines of his location; that

these end-lines relate to the *claim* as marked upon the ground, and not as the boundaries of the surface *portions* thereof *patented* to contesting parties, respectively; this proposition becomes a necessary deduction. It also explains why, under the law and in the patents of the United States, the method of granting is by description of the *entire location*, with an exclusion therefrom of the part previously granted to others.

"Fig. B," hereto attached, will illustrate the relations between the New York claim and the Last Chance claim as the result of the applications for patent and the adverse proceedings. The Last Chance application for patent covered, as we have already suggested, the entire rectangle known as lot 7263 A. An adverse proceeding was had by the New York, claiming by senior title as to the conflict territory. If the New York claim did not exist, then the Last Chance claim, by virtue of its location, would be entitled to the entire vein marked by the figures m—m, n—n; that is to say, it would be entitled to as much of the vein at any depth in the earth as it has of the apex of that vein within its *location*, which, in this case, would be co-terminous with the location itself. The New York, however, has in fact a portion of this apex, and is adjudged in the litigation to be the senior in rank. After the discussion already had, it is clear that of the vein the New York is entitled to the figure j—j, k—k; that is, to so much of this vein at any depth as it has of the apex.

The Last Chance *claim* included a "*section of the lode* within vertical planes drawn downward through the lines marked on the surface," with the right "to follow it outside of them, but within planes through the end-lines drawn vertically downward and continued in their own direction." (*Iron*

Silver Mining Co. vs. Elgin Mining Co., 118 U. S., 206.)

By the statute, Section 2326, a *part* of the claim may be patented to one, and a *part* of the claim patented to another. Manifestly, therefore, the Last Chance was entitled to and received as much of its claim, which included the whole "section of the lode" marked m—m, n—n, as was not granted to the New York; but as the rights of the New York on the vein are marked by the letters j—j, k—k, then all that was left after taking this out belonged to the Last Chance; and the Last Chance claim would possess not only that portion of the vein which upon "Fig. A" is indicated by the letters m—x and n—y, but would, under the law, be entitled to the whole section of the lode marked on "Fig. B," m—m, n—n, *except* that triangular portion of the same which is cut out by the intersecting lines j—k and m—n. These two claims covering the entire apex and the junior one being entitled to all that its location would call for, *except* that which is awarded to the senior location, resting upon the same vein, it becomes manifest that the rights given by the law are measured, not alone by the amount of apex which may be within the *patented surface* of the junior claim, but by the whole extent of apex within the surveyed *location* of such junior claim, subject only to the exclusion in favor of the senior claimant. It is upon this principle that the patents of the United States are framed; and the criticism of Mr. Rossiter W. Raymond, referred to by appellant results from an entire minunderstanding of what is intended to be conveyed by the statutes of the United States; the criticism entirely fails to meet the reason which prompts the Land Office in conveying by description of the *entire location*, and then *excluding* prior grants.

To further illustrate the philosophy of conveying mining claims by a description of the entire location, and by exclusion therefrom of senior grants within the same premises, we ask the attention of the Court to the three blue prints attached to this brief, and marked "Fig. C," "Fig. D" and "Fig. E."

In each of these figures the claim marked "A" is assumed to be senior in rank.

In "Fig. C" the *dip* of the vein is represented as being to the west, *i. e.*, on the convex side of the curved line of apex. Under the conditions thus illustrated, there would never be any conflict of right; because the south end-line of "A," and the north end-line of "B," *diverge*, as they follow the vein in its descent into the earth.

Suppose, however, that with the same course of apex, and the same relation of boundaries, it should be found, on development, that the dip of the vein is to the east, or on the concave side of the curved line of apex, as illustrated by "Fig. D." Now, there is a conflict of underground lines, and rights can be determined only by the rule of seniority. The senior claim "A," manifestly, has at any depth the entire length of vein between the vertical planes "a—a" and "b—b." If the claim "A" were not in existence, claim "B" would have, in like manner, at any depth, the entire length of vein between vertical planes "c—c" and "d—d." But "B," being junior, there is excluded from it so much of this section of the lode as has been already granted or reserved to "A." "B" has therefore much less of the vein underground than it has of the same vein on the surface. Its length of vein is rapidly diminishing, on descent into the earth, being bounded on one hand by the vertical plane "d—d," drawn through its own end-line, while in the other direction it is bounded by the

vertical plane "b—b," drawn through the end-line of the senior claim "A." In this case the rights of "B" are determined, and can be determined, only by describing its claim as a whole, and then excluding, either by express terms or by implication of law, such portion of the vein as already belongs to "A." In the case so illustrated, the resultant underground and surface rights of "B" are not coterminous, *i. e.*, bounded by the same parallel vertical planes, and the surface rights exceed in length the underground rights.

In "Fig. E," the course and dip of the vein are assumed to be substantially the same as in "Fig. C", but with the surface lines of the locations overlapping each other.

In this illustration, if the claim "A" did not exist, then "B", manifestly, would have the entire surface of its claim, and the entire section of the lode, at any depth included between the vertical planes "c—c" and "d—d". But "A" *does* exist, and its rights include all between planes "a—a" and "b—b."

Is not "B" entitled to everything which its claim would cover, *except* that portion thereof already granted to "A"? And how can "B" receive that to which it is entitled, except by describing its entire *claim* and the entire section of the lode included therein, and then excluding therefrom that which has been previously granted to "A"?

By this process, however, the surface rights of "B" are diminished more than its underground rights, and the length of vein underground to which it is entitled, (and plainly that means the section of the lode between the planes "c—c" and "d—d", not already owned by another) can be conveyed only by a description of the whole surface location, and of the corresponding section of the

lode, and then by excluding therefrom that *portion* of the surface and lode which belongs to "A".

A lode mining claim involves three dimensions: length, breadth and *depth*. The direction or extent of the *depth* cannot be known prior to development. The only practicable method of measurement prior to actual extraction of ores, must be by two dimensions, length and breadth, marked on the *surface*. But surely it is the purpose of the law to so apply these surface measurements as to give to the discoverer of the lode the full "section of the lode" which he claims, not already granted or reserved to another. The method of conveyance adopted by the Land Department accomplishes this purpose, and is the only method by which it can be accomplished.

Thus, the patent for the Last Chance lode mining claim, found in the record at page 4, describes first the entire rectangular tract marked "Survey Lot 7263 A." After having thus described it all, it expressly excepts that portion of the *ground* embraced in survey No. 7406, which is the New York claim, and excepts, also, that portion of the Last Chance vein and of other lodes and ledges throughout their entire depth, the *tops or apexes* of which lie *inside of the excluded ground*. We have already shown, however, that for instance, on "Fig. B," the portion of the vein in controversy which apexes within the New York, is marked by the letters j—j, k—k. Therefore, it it is only the part represented by that figure which is excepted from the section of the lode granted to the Last Chance. The grant, however, proceeds, near the top of page 6 of the record, as follows: "Said lot No. 7263 A (Last Chance location) extending 1,278.34 feet in length along said Last Chance vein or lode, *the granted premises in said lot* containing five acres and twenty-five

hundredths of an acre, more or less." So, we have here a distinction between the *survey lot* and the "granted premises," the latter referring to the surface acreage, while the lode which is conveyed is described as extending the full length of the rectangular location, excepting that part apexing within the *excluded surface*. Further on in the patent, and on page 6, the limitation upon the right of possession of the outside part of the vein is bounded not by parallel planes drawn through the patented surface, but is limited to such portions of the vein "as lie between vertical planes drawn downward through the *end lines of said lot 7263 A*, so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes or ledges." So that we have here the vertical planes drawn through the end-lines of the *location*, being the rectangular lot marked "7263 A," specifically mentioned as the lines which limit the subterranean rights of the Last Chance. The effect of the entire grant is, that it grants all of lot 7263 A, except that portion which had been conveyed under lot 7406; and it grants all of the lode apexing in lot 7263 A, except that part of the same which apexes in lot 7406. It follows, independent of any private conveyances and contracts, that the Last Chance lode mining claim would be entitled to the entire vein m—m, n—n, on its dip into the earth, except as to that part thereof previously appropriated by and granted to the New York, which would be the overlapping part of the figure shown by the letters j—j, k—k.

The appellants urge a proposition from Washburn on Real Property, which we accept *in toto*, and which, instead of affecting the validity of our argument, strongly supports it:

"As an exception is the taking of something

out of the thing granted, which would otherwise pass by the deed, it may be said in general terms that it ought to be stated and described as fully and accurately as if the *grantee* were the *grantor of the thing excepted.*"

3 Washburn on Real Property, page 431.

"Whatever may be passed by words of grant may be excepted by like words, and the same consequences attach to such exception as would have attached had it been a grant."

3 Washburn on Real Property, page 435.

These passages are cited by counsel for appellant. Let us apply them to the facts under consideration. The rights of the Last Chance location are to be considered as if the Last Chance had originally received all the rights which it would have received had there been no other location on any portion of the same territory, and had then by grant conveyed to the New York everything which the New York now has title to. This is the effect of the citations from Washburn. Now, if the Last Chance were the only claim upon the lode, it would have received, as we have already said, that portion of the vein marked, on Fig. B, by the letters m—m, n—n. If it had then granted to the New York all of the vein the New York now owns, included within the Last Chance location, it would have granted that figure marked by the intersecting lines j—k, m—n; and it would have retained as belonging to the Last Chance, all the residue of that portion of the vein included within the lines m—m, n—n; and this, we think, upon the principles announced by Mr. Washburn, to be the true situation as to these claims. But what does it leave for the Del Monte? Absolutely nothing; because the Del Monte has no portion of the apex. The apex is wholly owned

by other claimants and the conflicting rights are not between the Del Monte and the Last Chance, nor between the Del Monte and the New York, but are between the New York on the one part, as the owner of a portion of the apex, and the Last Chance on the other part as the owner of the residue of the apex; the conflicting portion of the vein on its dip being marked by the triangle, bounded on the south by the line m—n, and on the north by the line j—k, which portion goes to the New York by reason of its seniority of title.

These principles may be applied to each one of the several figures which counsel for appellant used in the Court of Appeals, and will probably use in this Court, to illustrate their theory. While no one of these figures correctly shows the true relations of the Last Chance, the New York and the Del Monte, yet they may be considered for the purpose intended of showing the possible consequences of the relations of mining claims one to another. We have attached hereto four blue-prints, each of which is an elaboration of the corresponding blue-print in the brief of appellant's counsel.

Applying the principles we have been discussing to appellants "Fig. 1," it is manifest that the New York, as the senior claim of the two, would own that portion of the vein marked j—j, k—k, being so much of the vein on its downward course into earth as the claim has of the apex within its *location*. Also, that the Last Chance claim, in this imaginary case, would have all the vein marked by the figures m—m, n—n, excepting that portion in conflict with the previous grant to the New York. That is to say, that the Last Chance claim would have as much of the vein at any depth as it has of the apex within its *location*, excluding only the por-

tion claimed by the other apex claimant by senior right.

Taking "Fig. 2." and assuming that the New York location is laid transversely upon the vein, so that the apex of the vein crosses the two side-lines as located, which thereby, under the decisions of this Court, become the end-lines, then it is apparent that the right of descent into the earth upon the vein, for the New York, would be shown by the lines j—j, k—k, in "Fig. 2." But, again, as before, the Last Chance would have the figure m—m, n—n, subject only to an exclusion in favor of the senior claimant—being entitled as before, to as much of the vein on its dip as there is of the apex, within its location, except as to that portion thereof owned by a senior apex claimant. So, again, with "Fig. 3," already referred to—the Del Monte, as the senior of the three claims, has, as already suggested, as much of the vein as it has of the apex within its location, which will be shown by the figure f—f, g—g; the New York claim in this imaginary position of the claims, would be entitled to follow the vein as shown by the lines marked j—j, k—k, except that it could not take that portion thereof which belongs to the Del Monte, but all the residue of the vein it would have the right to take, bounded only by the lines mentioned. In other words, it again would have as much of the vein as it has of its apex, excluding only that part belonging to the senior in rank, and in this figure the Last Chance, as the third in rank, would be entitled to all of the vein m—m, n—n, except that which had been granted to those older in right, for it would take as much of the vein as there is of the apex within its location, excluding only those parts previously granted to others. In "Fig. 4", the portion of the vein which would be available to the Last

Chance would be much greater than under "Fig. 3", for, again applying the same principles, the Last Chance, which has within the boundaries of its location the apex of the vein from end-line to end-line, would have as much of the vein in its downward course into the earth as it has of its apex, except the portions thereof previously granted to the Del Monte and to the New York, represented by the two triangles at either end of the Last Chance lode.

We respectfully submit that there is no case imaginable of different locations upon the apex of the same physical vein, whatever its meanderings, and whatever direction end-lines of the several locations may take, but what become simple and with rights easily ascertained, when this fundamental principle is once recognized, under the statute, to-wit: That each apex claimant owns as much of the vein at any depth as there is of its apex within the *lines of his location*, subject only to prior grants out of the same estate made by the Government to others. In other words, that any junior claimant has as much of the vein for its entire depth, as he would have had, had he been the senior patentee for his full claim and "section of lode," and had then conveyed to the overlapping claimants their several portions out of the estate thus conveyed to him.

CONCLUSION.

If the foregoing argument is sound, then the correct answers to the questions propounded by the Circuit Court of Appeals are obvious.

As necessary deductions from the facts set forth in the Record, and from the mining statutes, we confidently contend:

1. The substance of the grant made by the Government to the locator of a lode claim is the mineral deposit beneath the surface. Prior to the extraction of the ores, the extent of the deposit to be conveyed can be measured or defined *only* by surface survey lines, through which imaginary planes are drawn. Such survey lines do not invade the right of exclusive possession and enjoyment of the surface granted by statute to the senior proprietor. Such lines occupy no actual surface space of length or breadth. They are, however, the only practicable means of marking the "section of the lode" claimed by the junior locator. They mark the exterior boundaries, within which the rights of the junior locator are confined. The extent of his rights within these exterior boundaries is readily ascertained by excluding from the whole that which has already been granted or reserved to others. By this process no right of the senior locator is invaded. By no other process can the junior locator obtain what the law offers him.

Therefore, the lines of a junior lode location *may* be laid upon or across the surface of a valid senior location, for the purpose of defining for, or securing to, such junior location underground or extra-lateral rights, *not in conflict* with any rights of the senior location.

2. "A grant specifically describing only the two irregular tracts which constitute the granted *surface* of the Last Chance claim," would, in effect, correspond to a conveyance of like pieces of farming land, or town lots. All rights in each piece would be confined within vertical planes drawn through the several surface boundaries.

The property which the locators of the Last Chance asked for, and which the law offered to

them, was a "section of the lode" 1,278 feet long, and surface ground 300 feet wide, except so much of either, within the designated limits, as belonged to others.

If the end-lines of the New York were parallel with the end-lines of the Last Chance, then the premises excluded from the latter would have the same length on the surface and underground. If—as is, in fact, the case—the end-lines of one are not parallel with those of the other claim, then the corresponding vertical planes will take different directions, as they cut the vein on its dip, with the necessary result that the longitudinal extent of the *exclusion* will increase or diminish as depth is gained. If the dip of the Last Chance vein were to the east (being on the concave side of the curved line of apex), then the exclusion in favor of the New York would take a greater length underground than at the surface, and the residuum granted to the Last Chance would be shorter on the vein underground than at the surface. (As illustrated by Fig. D.)

On the other hand, however, the dip of the vein *is* to the west (or on the convex side of the curved line of apex). The inevitable result is that the excluded portion of the vein has a length which decreases with depth, while the residuum of the vein left to the Last Chance increases with depth, until it reaches its maximum, at the vertical plane drawn through the south end-line of the Last Chance *survey*. (As illustrated by Fig. B.)

Therefore, in the present case, the Last Chance patent, by first describing the rectangular claim and the lode therein in full, and granting all thereof, *except* the premises previously granted to the New York, does convey to the patentee more of the lode than would be conveyed by a mere description of the two irregular tracts of surface ground.

3. The "end-lines" of a lode mining *claim*, within the meaning of Revised Statutes, Sections 2320 and 2322, are the end-lines of the full claim included within the exterior boundaries of the survey of location. The term is not applied to the surface boundaries of "portions" of a claim, which may be patented to different parties. The end-lines mentioned by the statute are voluntary end-lines, fixed by the locator of the claim. They are not the lines fixed by an adverse claimant to mark a different and conflicting claim.

Therefore, the easterly *side* of the New York lode mining claim is *not* an "end-line" of the Last Chance claim, within the meaning of Sections 2320 and 2322 of the Revised Statutes of the United States.

4. If the foregoing conclusions are sound, then the fourth query propounded by the Court of Appeals is immaterial, as affecting the rights of the parties to this action. The answer to the question is, however, clear.

If a lode mining claim is so laid upon a vein that one surface end-line crosses the apex of the vein and the side-lines extending from such end-line run substantially parallel with the course of the apex, and so continue for several hundred feet, then certainly the claim is located "along the vein or lode," within the meaning of Revised Statutes, Section 2320.

If, then, by an angle in the side-line or a change of course of the apex of the vein, the latter passes out of the boundaries of the claim, it is nevertheless true that from the point where the apex enters across the end-line to the point where it departs across the side-line, the apex of the vein is *inside* the "surface lines extended downward

vertically." The statute, however, (Section 2322) expressly gives extra-lateral rights to the owners of all veins having their apexes "inside" such lines.

It necessarily follows, that if the apex of a vein crosses one end-line and one side-line of a lode mining claim, as located thereon, the locator of such vein may follow it, upon its dip beyond the vertical side-line of his location.

5. It follows also, as a necessary deduction, that on the facts presented by the record in this cause, the appellee *has the right* to follow its vein downward, beyond its west side-line and under the surface of the premises of appellant.

Mining litigation as to extra-lateral rights often (as in this case) arises from the contention that the owner of overlying surface—who is not the discoverer, and owns no portion of the apex of a vein—is better entitled to the ores than he who discovered the vein, and does own its apex.

The law intends to reward the *discoverer*; and as discoveries are almost invariably made upon the apex, it does this by giving to the owner of the apex, the ownership of the vein to any depth.

In discussing the various questions propounded by the Circuit Court of Appeals, we have endeavored to cover the whole subject matter. We believe the principles we have urged to be entirely sound. They will, when recognized and applied, solve numerous difficulties which, after all, are but imaginary, and yet which constantly arise, through the contentions of mere surface owners, against the rights of apex owners.

EDWARD O. WOLCOTT,
JOEL F. VAILE,

Counsel for Appellee.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

IN

THE SUPREME COURT

OF THE

UNITED STATES.

THE DEL MONTE MINING AND MILLING COMPANY,
Appellant,

vs.

THE LAST CHANCE MINING AND MILLING COMPANY,
Appellee.

No. 147.
(16,137.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR APPELLEE.

Since printing our main brief in this cause, we have received the brief of the appellant; and some matters there presented suggest the propriety of supplementing our argument, upon certain propositions.

The appellant contends that where the apex of a vein enters across one end-line and passes out

across the side-line of a mining location, the owner of such vein has no extralateral rights. The appellant argues that this is a necessary deduction from decisions heretofore made by this Court. We shall briefly review the authorities upon which this contention rests.

It will be observed, by reference to the maps introduced in evidence, that the Last Chance lode mining claim was located *along* the Last Chance vein; that as to that portion of the Last Chance vein in controversy in this action, the apex runs substantially parallel with the side-lines of the Last Chance location; that it is about midway of the north end-line, in entering the claim from the north, and that it is almost midway between the two parallel side-lines of the location, at the place where it passes out of Last Chance surface territory; that according to the map marked "Exhibit B", in the record, the course of the apex continues within the exterior boundaries of the Last Chance location all the way from the north end-line to a point within four or five feet of the southeast corner of the exterior boundaries of the claim. The Last Chance location therefore is *along* the vein and *not crosswise* of the vein.

If the same vein be considered in relation to the New York location, which has been used for illustration in the argument on both sides, it will be observed that the apex of the vein enters across the south end-line, and that the course of the apex is substantially parallel with the side-lines of the claim, for 1,070 feet out of a total of 1,359 feet of the surface location. The New York location is, therefore, *along* the vein, and is not crosswise of the vein.

Under these circumstances, what is the effect of the authorities cited by counsel?

Mining Co. vs. Tarbet, 98 U. S., 463: This case, commonly known as "the Flagstaff case," is the one in which this Court first decided that if the location is made crosswise of the vein, the side-lines become end-lines, and the end-lines become side-lines. The Court said:

"We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon *lengthwise*, in the general direction of such veins or lodes, on the surface of the earth, where they are discoverable, and that the end-lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction, either way, horizontally; and that the right to follow the dip outside of the side-lines is based on the hypothesis that the direction of those lines corresponds *substantially* with the course of the lode or vein at its apex, on or near the surface. It was not the intent of the law to allow a person to make his location *crosswise* of a vein, so that the side-lines shall cross it, and thereby give him the right to follow the *strike* of the vein outside of his side-lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the *lode*. Their right to follow the dip outside of their side-lines cannot be interfered with by him. His right to the lode only extends *to so much of the lode as his claim covers*. If he has located crosswise of the lode and his claim is only 100 feet wide, that 100 feet is all he has a right to." (Pages 467-8.)

The principle, therefore, which guided the Court in this decision was that the claim should be located lengthwise of the vein, and not across the vein. In the case at bar, the claim is located lengthwise of the vein, and, under no view of the facts, can it be construed as being located cross-wise of the vein.

Iron Silver Mg. Co. vs. Elgin Mg. Co., 118 U. S., 196. This case (commonly known as "the Horse-shoe case") was one where the outcrop took a curved course, and the location was made in such a way as to have fourteen corners. The dip of the lode was on the convex side of the curved line of outcrop, and the vein, upon its descent into the earth, dipped under the surface of the Gilt-Edge lode mining claim. The lines designated by the locator as end-lines were parallel to each other, but, if extended in their own direction, upon the dip of the vein, would not embrace any portion whatever of the vein under the surface of the Gilt-Edge claim. We cannot do better than to quote and adopt the language of the Supreme Court of California in reference to that case, as applicable to the question under consideration. The Supreme Court of California, after citing the case referred to, said:

"The language of the opinion of the Court in that case must be considered in reference to the facts of the case, and the points which were before the Court for decision. The question involved was the right of the defendants therein, who were the owners of a lode location called the Stone claim, to follow a vein, the apex of which was within the surface lines of said claim, into an adjoining claim owned by plaintiffs, called the Gilt-Edge claim. When defendants offered evidence to prove their right to follow their vein into Gilt-Edge ground, the plaintiffs objected, because, 'by reason of the surface *form or shape* of the Stone claim, its owners had no right' to follow, etc., and because 'no part of the Gilt-Edge claim, or the mineral or lode within it, was *within vertical planes drawn downward through the end-lines* of the Stone claim and continued indefinitely in their own direction.' (Pages 202, 203.)

"The objection there was not that the end-lines

of the Stone claim were out of parallel; and, as a matter of fact, what were claimed to be the end-lines *were* parallel. The objection rested on the general 'form or shape' of the Stone surface location, and on the fact that the disputed ore in the Gilt-Edge was not within vertical planes drawn through the end-lines of the Stone claim. The objection was very properly sustained, as a glance at the Stone surface location will at once show. * *

"Here is a surface location, with nearly a dozen exterior lines, with no distinguishable side-lines or end-lines, made in extreme violation of the usages and principles of location recognized by the statutes, and which, if it gave any right to follow a vein at all, would give the right to follow veins in nearly a dozen different directions. The lines which are designated as end-lines are not end-lines at all; the one designated as the south end-line—from the figure 6 to the figure 5—would, if extended, run through the center of the location, and, as stated in the opinion, the ore taken from the Gilt-Edge was not within planes drawn through the asserted end-lines. As was said by the learned judge of the Circuit Court who tried the case: 'With superficial attention to the letter of the law, and in utter ignorance and disregard of its principles, the two lines were made in equal length and parallel with each other, but so arranged that they never can perform the office assigned to them in the law.'"

Doe vs. Sanger, 83 Cal., 203, 211.

In this connection, we suggest that this Court, in deciding the Horseshoe case, used this language:

"The exterior lines of the Stone claim formed a curved figure, somewhat in the shape of a horseshoe, and its end-lines are not and cannot be made parallel. What are marked on the plat as end-lines are not such. The one between numbers 5 and 6 is a side-line. The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided

figure, and, apparently, for no other reason than their parallelism, called them end-lines." (Page 208.)

The decision in that case was not in any respect based upon the relation of the apex to the side-lines, but was based upon the form and shape of the surface claim, and upon the fact that what the locator designated as his end-lines would not, if extended, embrace the ore in controversy.

It is true, that in the case of *Bluebird Mining Co. vs. Largey*, 49 Fed. Rep., 289, 291, cited by appellant, the district judge said:

"But if it should appear that the apex of the Bluebird vein did not pass through the end-lines of that claim, but passed through one end-line and one side-line, then the rights of plaintiff, at least, are determined by the case of *Iron Silver Mining Co. vs. Elgin Mining and Milling Co.*, 118 U. S., 196."

But this remark, made *arguendo* by that judge, is overruled by his own immediate superior tribunal, to wit, the Court of Appeals for the Ninth Circuit, in cases cited in our original brief; and this Court has, in express terms, held that the question involved has not by this Court been decided, for this Court says:

"It has been held by this Court, in the cases heretofore cited, that where the course of a vein is across instead of lengthwise of the location, the side-lines become the end-lines, and the end-lines the side-lines. *But there has been no decision* as to what extralateral rights exist if a vein enters at an end-line and passes out at a side-line."

The Last Chance M. Co. vs. Tyler M. Co., 157 U. S., 683, 696.

The remark of Judge Knowles, in the Bluebird

case, must, therefore, go for nothing; and it is very apparent that this Court has held that the Horseshoe case does not decide the point for which appellant is contending.

Argentine Co. vs. Terrible Co., 122 U. S., 478, 485. This case but follows the case of *Mining Co. vs. Tarbet*, from which it quotes, and the language of the Court again agrees with our contention, to wit, that extralateral rights are not destroyed unless it shall be found that the location is cross-wise of the vein, instead of being lengthwise of the vein. Thus, the Court says:

"The instruction asked assumes that the longest sides of its claims were their side-lines. Such would undoubtedly be the case if the locations of the claim were *along the course* or strike of the lode. The statute undoubtedty contemplates that the location of the lode or vein claim shall be *along the course* of the lode or vein. [Quoting statute.]

"When, therefore, a mining claim crosses the course of the lode or vein, instead of being 'along the vein or lode', the end-lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side-lines are those which measure the extent of the claim on each side of the middle of the vein at the surface." (Page 485.)

In this case, therefore, the Court does not hold that if the claim is in fact located lengthwise of the lode, it loses any of its extralateral rights; while, on the contrary, the necessary effect of this decision, like that of its predecessors, is that the extralateral rights are preserved, if the location is made, as the law contemplates, lengthwise of the vein.

King vs. Amy & Silversmith Mg. Co., 152 U. S., 222, 228: The Court in this case announces no new

principle, and but follows, in exact terms, the previous decisions. Thus, the Court says:

"In the Amy claim, the lines marked as *side*-lines cross the course of the strike of the vein, and do not run parallel with it. They therefore constitute end-lines."

And, further down, the Court says:

"Where it (the Court) finds, as in this case, that what are called *side*-lines are in fact *end*-lines, the Court in determining his lateral rights, will treat such side-lines as end-lines, and such end-lines as side-lines. But the Court cannot make a new location for him, and thereby enlarge his rights."

This case, therefore, as rightly held in the subsequent *Tyler* case, in 157 U. S., did not decide the question which is now under discussion.

Catron vs. Old, 23 Colo., 433: This case is not at all parallel to the one under consideration. It was a case where an apex of the vein entered across one side-line and then passed out of the same side. It did not cross any end-line; and the Court very clearly shows that it is not deciding the principle involved in our case, by its reference to the case of *The Del Monte Mining and Milling Co. vs. N. Y. and Last Chance Co.*, 66 Fed. Rep. 212, already cited in our principal brief. Referring to that decision, the Supreme Court of Colorado said:

"Explorations had disclosed that the New York vein, in its general course, had within its side-lines the apex for a distance of 1,070 feet. As the vein entered one end-line of the New York claim, the only difficulty found by the District Judge, grew out of the fact that it departed from the side-lines of the claim about 280 feet from the end-line

opposite the place of entrance, the claim being less than the full length allowed by statute. In these circumstances, upon a preliminary application, the learned District Judge held that the owners of the New York were entitled, by reason of their apex rights, to follow the vein in its downward course through the side-lines of the claim, and beneath the surface boundaries of the Del Monte location. While there are some expressions in the opinion which would seem to be in favor of the contention of appellees in this case, if the facts are not considered, yet when it is remembered, that the vein entered one end-line of the New York claim, and extended more than 1,000 feet in a general direction parallel to the side-lines of the claim, it would seem that the decision is hardly in point in this case." (Page 440.)

So that the Court in that case says nothing by way of dissent from the conclusions of Judge Hallett in the Del Monte case.

Referring, however, to decisions that *do* bear upon the question under consideration, we call the attention of this Court to the fact, that every decission (which directly involves the question now at issue), barring the remark made, *obiter*, by Judge Knowles, has been in favor of the contention of the appellee; and these decisions come from judges who are, many of them, of long experience in the interpretation of mining statutes. We take up some of these cases, in chronological order.

Mr. Justice Miller, for so many years a member of this Court, upon the trial of a case in Colorado, in 1879, in instructing the jury, said:

"Now, gentlemen, I have but one more matter, and really I do not know that there is much to be said about that. The defendants maintain that the lines—the side-lines—of the plaintiff's claim are so located, in reference to the shoot or strike of the

vein which they claim to pursue, that he has no right to pursue it at the point where this controversy exists.

You must take all the evidence together; you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, *and the course it takes;* and from all that you are to say what is its *general course.* The plaintiff is not bound to lay his side-lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In *such event* his end-lines become his side-lines, and he can only pursue it to his side-lines, vertically extended, as though they were his end-lines; *but* if he happens to strike out diagonally, *as far as his side-lines include the apex*, so far he can pursue it *laterally.*"

Stevens vs. Williams, 1 McCrary, 480, 490.

Judge Thayer, (Judges Caldwell and Shiras sitting with him,) held in accordance with our contention. He says:

"If the vein on which the Colorado Central location rested, became divided as it entered the disputed territory, and the outcrop of one fork crossed into Aliunde territory, then it followed that the Colorado Central claim had been laid rather obliquely to the course of the outcrop, and, in that event, we are of the opinion that the defendant lost that fork of the vein which had passed outside of its side-lines. In other words, so far as that fork is concerned, *the south end line of defendant's Colorado Central claim must be regarded as a line drawn through the point where the outcrop passed through its south side-line.*"

Colo. Cent. Consol. Mg. Co. vs. Turck, 50 Fed. Rep., 888, 896.

Judge Hawley, (Judges McKenna and Gilbert sitting with him,) in the Circuit Court of Appeals

for the Ninth Circuit, supports our contention, in explicit language, as quoted in our main brief at pages 25 and 26.

Tyler Mg. Co. vs. Sweeney, 54 Fed. Rep., 284, 292.

So, again, Judge Hawley, (Judges McKenna and Knowles sitting with him), in the Circuit Court of Appeals for the Ninth Circuit, held to the same effect:

"The lode located by the Tyler in its true course lengthwise crossed the southerly side-line of the location, at a point distant 427 feet from the easterly end-line of the Tyler location. It could not follow the lode lengthwise beyond the point where it crossed its side-line. It abandoned its right to the surface ground beyond that point, and drew its easterly end-line parallel with its location at that point, so as to only include the ground in which the lode extended lengthwise within the side-lines of its location. No valid reason has been advanced by counsel, and we are not aware of any, why the end-line of the claim could not be thus changed in order to comply with the laws of the United States requiring the end-lines to be parallel. *The law itself would make the end-line at that point, so far as any extralateral rights to follow the lode in its downward course were involved.*"

Last Chance M. Co. vs. Tyler M. Co., 61 Fed. Rep., 557, 560.

So again, Judge Hawley, in the Circuit Court for the Northern District of California, says:

"It is a universal rule of construction that the decisions of courts are to be interpreted with reference to the facts in each particular case. In the Amy case, the Court held that the side-lines of the claim constituted the end-lines of the location. Why? Because 'the lines marked as side-lines cross the course of the strike of the vein, and do

not run parallel with it.' It would be a contortion of the facts and of the law to construe the principles announced in the Amy case as applicable to a location like the Ural, where the lode, as located by the surface claim, crosses through the northerly end-line, and runs nearly parallel with the side-lines for a distance of about 1,400 feet, when it changes its course, and crosses the easterly side-line of the surface location, about 600 feet north of the southerly end-line of the location. It cannot, it seems to me, consistently be said that complainant is deprived of any of its extralateral rights to the 1,400 feet, more or less, which is all entirely within the surface lines of the Ural patent and substantially parallel with its side-lines as marked upon the surface ground. The statute of the United States is not, in my opinion, susceptible of any such construction, and no decision of any national or state court has ever gone to that extent. The Supreme Court of the United States in the Amy case simply decided that when a mining claim is located *across*, instead of *along*, the lode, its side-lines must be treated as its end-lines, and its end-lines as its side-lines; so that, under *Rev. St.*, section 2322, the dip cannot be followed outside the vertical plane of the original side-lines into an adjoining claim."

Consol. Wyoming G. M. Co. vs. Champion M. Co., 63 Fed., 540, 547.

Judge Hallett, in the Circuit Court for Colorado, holds the same doctrine very clearly, in a case already cited in our principal brief, at page 21.

Del Monte M. & M. Co. vs. N. Y. & L. C. M. Co., 66 Fed. Rep., 212.

Judge Beatty, in the Circuit Court for Idaho, says:

"The right granted is to follow it [the vein] downward wherever it may go, regardless of the vertical planes of its side-lines, and for a length along its course equal to the length of apex within

his surface limits, restricted only by the vertical extended planes of his end-lines. What reason, under the law can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that the ledge must run from end to end, but he is granted this right of following 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines.' Upon the fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of his location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away, and we take all from the law that is of value to the miner. Courts will not fritter them away by ingrafting into the law antagonistic common-law principles, or other judicial legislation."

> Tyler M. Co. vs. Last Chance M. Co., 71 Fed. Rep., 848, 851.

Judge Beatty again, sitting in the Northern District of California, held in the same way, in a later case.

> Carson City G. & S. M. Co. vs. North Star M. Co., 73 Fed., 597, 602.

Judge Hawley, (Judges Gilbert and Ross sitting with him) in the Circuit Court of Appeals for the Ninth Circuit, held the same way again, in a very recent case:

> Republican Mining Co. vs. Tyler Mining Co., 79 Fed. Rep., 733.

We confidently insist that, both upon reason and upon authority, the appellee's contention should be sustained, and that a locator whose loca-

cation is lengthwise of a vein, the apex of which crosses his end-line and runs substantially parallel with his side lines, has the extralateral right upon the dip of that vein, for as much of the vein in horizontal length, at any depth, as he has of the apex within his surface location, subject to any superior rights of other apex claimants.

APPELLANT'S MISCONCEPTIONS.

Our main brief in this court is very largely a reprint of our brief in the Court of Appeals. We had supposed that we had made our meaning very clear; but it would seem, from certain language in the appellant's brief, that we are not correctly understood by the appellant.

At page 15, of the appellant's brief, it is said:

"If the absurdity [of appellee's contention] is based upon some supposed necessity, the latter is equally absurd, for if the government may confirm a second grantee in the ownership of something it has *already granted*, it certainly would be remiss if it did not also collect the statutory compensation therefor, from the second as well as from the first grantee."

We have never contended that the second grantee obtained anything which had been already granted. We do contend, that in order to obtain that which has not been already granted, it may be necessary to lay survey lines upon territory already appropriated.

Section 2319 of the Revised Statutes provides for the purchase of two entirely distinct things: One, the mineral deposit; the other, the lands containing the mineral deposit. The language of the statute is as follows:

"Section 2319. All valuable *mineral deposits*, in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and *purchase*, and *the lands* in which they are found to occupation and *purchase*, by citizens of the United States."

For illustration, let us take appellant's Fig. 4, as the same is elaborated in the corresponding figure, given in appellee's brief. In that case the senior claim has appropriated and owns all that portion of the vein marked by the lines "f—f," and that line measures the extent of the first appropriation, for any depth into the earth. So, again, the second in rank has appropriated so much of the vein as is marked by the lines "j—j," and that measures the extent to which the second locator is entitled, at any depth, upon the vein. There is left, however, between the two locations, something for a third locator. It measures, in the illustration used, about 600 feet of apex; but, as the vein descends into the earth, the extent of *un*appropriated vein increases, by reason of the diverging lines of the other two locators. But this unappropriated vein, at any depth, is subject to appropriation and purchase, under Section 2319. A man who would obtain it, however, finds himself bound by certain statutory provisions: 1st, he cannot take more than 1,500 feet of it, at any depth; 2d, he cannot locate it at all, without a *discovery*, which he will make on the line of free apex; then his location lines must be so located as not to be more than 150 feet on each side of the middle of that vein, at the surface. Therefore, to appropriate this hitherto unappropriated mineral deposit, lying in the depths of the earth, he must mark what he wants by some surface lines. He does that by drawing a rectangle, which overlaps, indeed, the first and second loca-

tions, but which does not, by that means, interrupt the enjoyment and possession of his neighbors. But the vertical planes drawn through the end-lines of his rectangle, will mark the section of the lode which, at any depth in the earth, will mark out his portion of the mineral deposit which the law says he may purchase; and it does this by taking his whole rectangle, and the segment of the lode included between the vertical planes drawn through his end lines, and simply excluding therefrom the portion of the lode, and of the surface, which has already been granted to others. Certainly that which has not been granted to others is open to him; and the only way by which he can designate it is by his lines, laid upon the surface. By this process he does not take anything which has been granted to another; he takes that which is left as public property, after the grants to others have been fully satisfied.

At page 17, speaking of patents under the law of 1866, appellant says:

"Ostensibly, this language would seem to be a grant of 1,500 feet in length of the lode located, irrespective of the amount of surface ground covered by the patent. Such a thing was, however, *practically impossible*, under the act of May 10, 1872, and the grant of the vein, in terms, was mere surplusage, for the section of the vein included within the surface ground covered by the grant, whether more or less in length than such surface ground, passed with the grant."

The meaning of the last part of this sentence is not entirely clear to us; but we insist that it is *not* "practically impossible" to convey 1,500 feet in length of the lode, even though there be not so much left of the surface, provided there be, underground, as much as 1,500 feet of the lode left un-

appropriated by others; for, as above suggested, this underground mineral deposit is, of itself, a subject of purchase, and may be obtained to the full extent allowed by law, even though the extent of unappropriated apex is less than that of the unappropriated lode at depth in the earth. There is absolutely no provision in the law, anywhere, that the length of unappropriated apex shall limit the discoverer's right to the unappropriated vein on the dip. The only limitation upon the latter, is that it shall not exceed 1,500 feet in length.

"Any *portion* of the apex on the course or strike of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title; for while the owner of a vein may follow it in its descent into another's territory beyond his own side lines, he cannot beyond his end-lines, and *the vein beyond those end-lines* is subject to further discovery and appropriation."

Larkin vs. Upton, 144 U. S., 19, 23.

At page 21, of appellant's brief, speaking of our contention that a description of the entire Last Chance rectangle and section of the lode, and a conveyance of the same with an exclusion of previously granted territory, gives us a greater right underground than if only the unappropriated surface had been described, counsel says:

"This extraordinary claim not only *ignores* the grant of the New York claim, which is older in time, as well as in right, and which is just as broad in its terms as the other, but it overlooks as well the express terms of its own grant. The patent, after describing the boundaries of the original application, and the extent of the exception and exclusion therefrom, declares in terms, that 'The granted premises in said lot contain five acres and twenty-five hundredths of an acre, more or less.' It also declares that 'There is granted to Granger

et al, the mining premises hereinbefore described, and not expressly excepted from these presents.'"

Our claim does not in the slightest degree ignore the grant to the New York claim, but fully recognizes it, as we are bound to do under our patent. On page 5, of the record, it is stated that we had entered and paid for the mining claim or premises known as the Last Chance lode mining claim, and then follows a description of the entire rectangle, closing, at the bottom of page 5, after a full description of the entire rectangle, with these words:

"Expressly excepting and excluding from these presents all that portion of the ground hereinabove described, embraced in said mining claim or survey No. 7406, and also all that portion of said Last Chance vein or lode, and of all veins, lodes or ledges throughout their entire depth, the tops or apexes of which lie inside of said excluded ground, said lot No. 7263–A extending 1278.34 feet in length *along said Last Chance vein or lode*, the granted premises in said lot containing five acres and twenty-five hundredths of an acre, more or less."

The next clause expressly grants to the patentees "The said mining premises hereinbefore described and not expressly excepted from these presents;" but, as shown in Fig. "B" in appellee's brief, all that was, or could be excluded from the last chance rectangle and the section of the lode measured by it, would be the portion granted to the New York, shown by the apex line "j—j," and the same extent of vein, at any depth in the earth, upon its dip. When we say, therefore, that we received all that our entire rectangle and section of the lode would call for, *except* that which has been granted to the New York, we do not ignore the grant to the New York, nor do we claim any

more for ourselves than our patent expressly conveys.

So again, on page 25, the appellant says:

"We have yet to find an authority in support of the proposition that an exception like the one under consideration does not except, that such an exclusion does not exclude and, that, in spite of its terms, the appellee has within the New York an end-line, and extralateral rights based thereon, by which it may *invade the territory* of others and remove ores from their mines, under a pretense of ownership *expressly denied* it by the Government.

"It is hardly possible that expressions like these become meaningless, when applied to the exceptions and exclusions contained in a mining patent; and yet they must be, if the appellee has vested rights for any purpose, in any part of the ground excluded from its grant."

As already said, we fully admit the exception. We exclude that which the patent excludes. But, because we exclude that which has already been granted to another, it does not mean that we must exclude another large portion of the mineral deposit, which we would be entitled to take if the New York were not there. An exclusion of that which belongs to the New York does not require a further and additional exclusion in favor of some adjacent surface proprietor. We do not claim any "vested rights," for any purpose, in any part of the ground excluded from our grant. The running of a survey line, as already abundantly argued, takes no right from anybody else. It is simply a method of designating where our underground rights would terminate. The exclusion is as definite and precise as it can be made by description; and the residuum left, after the exclusion, is as definitely and positively known as if it had been separately described as a fragment; while, by reason of the three dimen-

sions involved, it is much more easily described by the rule of exclusion than in any other method.

Overlapping surveys have been recognized and positively directed by the Land Department ever since the law of May 10, 1872, was enacted, as illustrated by the circulars and decisions printed in the appendix to this brief.

On page 31 of appellant's brief, counsel says, that under appellee's theory—

"[1.] It is impossible to conceive of any fractional piece of ground, however shaped, and surrounded by old and valid locations, which cannot be located by throwing imaginary boundaries across private property, and [2] so juggling with them, subsequently as to give its owner the right to go beyond his boundaries, regardless of rights previously secured by such older locations."

The first clause in this proposition is true; and we insist that the law contemplates that however irregular a piece of surface ground, containing a vein, may be, it may be located, and that any unappropriated vein which apexes within it may be located, of course, without invading, as we could not invade, the rights of other appropriators of the same vein or any portion thereof. It is the unappropriated portion that may be taken, and this without regard to the form of unappropriated surface; provided the apex of the vein be within it.

It is not true that, by any process of "juggling" with lines, under our contention, the owner of the fractional surface would obtain the right to go beyond his boundaries, regardless of rights previously secured by such older locations. On the contrary, those rights would be thoroughly protected by the prior grant, and it is only that which is left, with defined boundaries—which may, however be different underground from what they are on the sur-

face—which the junior locator may take; and no "juggling" of lines can in any way impair the rights of senior locators. We have already said in our principal brief, and beg leave to repeat, that if the principles which we have announced be applied in the construction of mining rights, "there is no case imaginable of different locations upon the apex of the same physical vein, whatever its meanderings, and whatever direction the end-lines of the several locations may take, but what becomes simple and with rights easily ascertained." (See page 38 of principal brief.)

Again, appellant says, at page 38 of his brief:

"All he [the appellee] does assert, is a right to go back to his 'line of location,' identify it, and then shove it north for 800 feet."

Counsel entirely misstates our position. We do not shift the south end-line in the slightest degree. We say that between the north end-line and the south end-line of the rectangular location we have everything, surface and vein, which has not been previously appropriated; and that means the entire rectangular surface, and entire section of the lode, remaining, after excluding from it so much of the surface as is within the New York location, and so much of the Last Chance vein, and other veins as *apex within the New York location.* Everything else included between our two end-lines of location we claim, and it was granted to us, in express terms, by our patent, pursuant to law.

On the same and following pages, the appellant's counsel says:

"Yet they (the appellee) are contending for a location, one-half which has been adjudicated to be worthless, and for which patent has been issued to another."

Nay, not so. We claim nothing that has been adjudicated to another. We claim all, however, that would be included within our own location, *except that* which has been adjudicated to another; this, and no more.

There is no contention between the owners of the Last Chance and the owners of the New York. The rights of each are well defined, and do not in the slightest degree conflict.

At page 40, of appellant's brief, counsel says:

"[Appellee] discovered a vein leaving the Amethyst south end-line, and running southerly into the north side-line of the New York. Its unappropriated length was about 700 feet. They might have located a rectangular claim 700 feet long upon it, if they had desired, without trespassing upon a foot of private property. They preferred to make a claim to 1,500 feet of it instead, and thus rob the New York of 800 feet of its vein. They failed. Can they now be heard to say that the New York side-line is not their south end-line, or that they may still claim their end-line, when they saw fit to take it, notwithstanding the adjudications of the courts? Such a proposition is monstrous."

This paragraph of appellant's brief goes outside of the record in its statement of fact; and, in doing so, falls into an error of fact. But, in a discussion of the legal question involved, this is immaterial. We suggest, however, in passing, that it is rather a singular argument, that if we had drawn an end-line 700 feet south of our north end-line and parallel with the latter, we would have extralateral rights and would be entitled to the ore in controversy, under the Del Monte claim; but that, by drawing our line at a point *more* than 700 feet south, although parallel with our north end-line, we have no extralateral rights whatever. The argument at

once suggests that the Del Monte has no claim to this ore, except through reliance upon what is contended to be a technical failure to comply with the law, on the part of the appellee, which technical failure, however, if our argument is sound, does not exist.

But assuming that the New York had not only located, but had patented, its claim, prior to the location of the Last Chance, yet the lines over the surface of the New York claim would not or could not rob it of 800 feet, or any portion, of its vein; and, as already suggested, would be but a method of designating the section of the lode which the Last Chance desired to obtain, subject to the rights of the New York. The locators of the Last Chance, on the assumption stated, would necessarily know that the northerly limits of the New York rights upon the vein in controversy would either be the New York north end-line or a line parallel with the New York end-lines; and in either event, that line as it followed westwardly on the dip of the vein, would diverge from the course of the Last Chance end-line. The unappropriated mineral deposit would therefore, as the Last Chance locators must well know, have a much greater extent underground than at the surface, and being unappropriated, was subject to location by a discoverer of that vein who should hold any portion of its apex. In order, therefore, to appropriate this underground mineral deposit upon this vein, it would be necessary, as already abundantly argued, to place the line which was intended to mark the southern vertical plane of the Last Chance, at such a distance south of the north end-line of the Last Chance as to include the full section of the lode underground which might then remain unappropriated. This could not rob the senior locator,

because his rights would be preserved by his prior grant. But it would take, of the vein, *whatever is left* within the section of 1,500 feet in length—all that the senior locator *had not* appropriated.

Throughout the entire argument of appellant, there is an assumption of some trespass by the owners of the Last Chance upon the claim of the New York, and one would suppose, from the line of argument used, that the appellant in this case was the New York. But it is not. The Del Monte claims adversely to the New York as well as to the Last Chance, and has litigation pending with the New York company. As already suggested, there is no controversy between the Last Chance and the New York, who, between them, hold the entire apex of the vein in controversy, from the north end-line of the Last Chance, to the south end-line of the New York. This vein could never be acquired by the owners of the Del Monte, under the mining laws of the United States. Not by discovery, because there could not be a discovery within the surface boundaries of the Del Monte, in such a way as to comply with the provision of the law which says that the claim shall be not more than 150 feet on each side of the middle of the vein *at the surface*. The Del Monte obtained its patent, not by virtue of a discovery of this vein, but by virtue of the discovery of some other vein not here in controversy. But, in taking its patent for its territory, by virtue of the discovery of such other vein, it took it subject to this express provision in its patent; to-wit:

"That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundaries of said granted premises, should the same, in its dip, be found to penetrate, intersect or extend into said

premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge." (Printed record, page 4.)

By the very terms, therefore, of the Del Monte patent, it took its title subject to the right of the owners of the Last Chance vein to follow that vein, upon its dip, under the surface of the Del Monte, and to extract and remove the ore therefrom.

We respectfully insist that under no construction of the mining laws of the United States can the Del Monte be awarded the ores situated in the Last Chance vein, and lying between the two vertical planes, one drawn through the north end-line of the Last Chance, and the other through " the north compromise line."

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Counsel for Appellee.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Nov. 5, 1874.

T. B. SEARIGHT, ESQ., Surveyor General, Colo.:

* * * * * * *

In this connection, I would state that the surveyor general has no jurisdiction in the matter of deciding the respective rights of parties in cases of conflicting claims.

Each applicant for a survey under the mining act is entitled to a survey of the entire mining claim, *as located*, if held by him in accordance with the local laws and Congressional enactments.

If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plat and field notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the distances from the established corners at which the exterior boundaries of the respective surveys intersect each other.

* * * * * * *

Very respectfully,

S. S. BURDETT, *Commissioner*.

1 Copp's Land Owner, page 133.

MINES AND MINERALS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., Nov. 16, 1882.

TO UNITED STATES SURVEYORS GENERAL:

The regulations of this office require that the plats and field notes of surveys of mining claims shall disclose all conflicts between such surveys and prior surveys, giving the areas of conflicts.

The rule has not been properly observed in all cases. Your attention is invited to the following particulars, which should be observed in the survey of every mining claim:

1. The *exterior boundaries* of the *claim* should be represented on the plat of survey and in the field notes.

2. The intersections of the lines of the survey, with the lines of conflicting prior surveys, should be noted in the field notes and represented upon the plat.

3. *Conflicts* with unsurveyed claims, where the applicant for survey *does not claim* the area in conflict, *should be shown* by actual survey.

4. The total area of the claim embraced by the *exterior boundaries* should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

Total area of claim..... 10.50 acres
Area in conflict with survey No. 302.... 1.56 "
Area in conflict with survey No. 948.... 2.33 "
Area in conflict with Mountain Maid lode mining claim, unsurveyed .. 1.48 "

In a number of instances that have come to the attention of this office, the total area in conflict has been given, but not the area in conflict with *each* intersecting claim. The portion of the plat not in conflict has been colored and the remainder left uncolored. The language of the field-notes has been such as to convey the idea that the conflicting areas were excluded from the claim, whereas such was not the intention. It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys, the areas of conflict are to be excluded. The field-notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. It is better that the application for patent should state the portions to be excluded in express terms. A survey executed as in the example given will enable the applicant for patent to exclude such conflicts as may seem desirable. For instance, the conflict with Survey No. 302 and with the Mountain

Maid lode claim might be excluded and that with Survey No. 948 included.

Your attention is also invited to another matter. The practice of coloring portions of surveys, leaving other portions uncolored, is open to the same objections that have been stated concerning the field-notes. In the future no coloring will be used.

N. C. McFarland,
Commissioner.

Copp's Land-Owner, Vol. IX., page 162.
1 L. Dec., 551.

Grand Dipper Lode.

Acting Commissioner Harrison to United States Surveyor General Robbins, Tucson, Arizona, August 2, 1883:

* * * * * * * *

You state, and it is shown to be so by said diagram, that the said Grand Dipper Lode, so *located*, is a four-sided figure, with parallel end lines, the provisions of Sec. 2320, U. S. Revised Statutes, being fully complied with.

The survey of the claim made by the deputy surveyor cuts off a portion of the right end, shown to be in conflict with the Emerald Lode, the easterly end-line of the Emerald claim thus becoming one of the boundary lines of the said "Grand Dipper," and not parallel to the easterly end-line of the Grand Dipper survey.

I cannot see how you can give your approval to such survey. No reason exists why the survey lines should not conform directly to the lines of the *location*, they being properly run in the first instance. The instructions of this office, to be found in Vol. 1, page 133, Copp's Land Owner (Copp's Min. Lands, 2 Ed., page 217), are intended to meet just such a contingency, and that conflicts with other claims may be clearly shown and not avoided, you will find there laid down, the manner in which intersections with conflicting claims may be noted,

and of the running of courses and distances from such points of intersection to establish corners of such conflicting claims." * * * * * * * * *

10 Copp's Land Owner, p. 240.

See, also—

Second paragraph circular December 4, 1884, printed in appendix to appellant's brief.

3 L. Dec., 540.

BLACK DIAMOND LODE.

(Syllabus:)

"For the purpose of including ground held and claimed under a lode location, which was made upon public land, and valid when made, the end-line of the survey of said lode claim may be established within the boundaries of a *patented* placer."

22 L. D., 284.

No. 147.

Add'l Brf. of Wolcott & Vaile for
Appellee (by Leave)
IN

THE SUPREME COURT

Filed Dec. 28, 1897.

UNITED STATES.

THE DEL MONTE MINING AND MILLING COMPANY, *Appellant*,
vs.
THE LAST CHANCE MINING AND MILLING COMPANY, *Appellee*.

No. 147.
(16,237.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLEE'S COMMENTS ON THE CASE OF STRATTON vs. THE GOLD SOVEREIGN M. & T. CO.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Solicitors for Appellee.

IN

THE SUPREME COURT

OF THE

UNITED STATES.

THE DEL MONTE MINING AND MILLING COMPANY, *Appellant*,

vs.

THE LAST CHANCE MINING AND MILLING COMPANY, *Appellee*.

No. 147.
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ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLEE'S COMMENTS ON THE CASE OF STRATTON vs. THE GOLD SOVEREIGN M. & T. CO.

With the consent of the Court, the appellant has, since the oral argument, filed as an authority in its behalf a decision by Judge Hallett in the case of *W. S. Stratton vs. The Gold Sovereign Mining and Tunnel Company*, said decision having been

rendered on December 6, 1897. When properly understood, we cannot see how this decision can in any way be an authority for the appellant.

So far as relates to the contention of the appellant that the survey lines of a junior location can not, for any purpose, be laid within the surface lines of a senior location, it is very certain that Judge Hallett was not intending in this last decision to in any way modify the views which he expressed in the Del Monte case now at bar, as set forth in his opinion found at page 15 of the appellee's principal brief in this cause, and as to no other question involved can the Stratton case be fairly urged as an authority.

In the Stratton case, the Logan location, belonging to Mr. Stratton, was prior in time to the date of the location of the tunnel site, and as the Logan claim was subsequently patented, its rights relate back to the date of its location, for every purpose of conflict and ownership of ores within that location.

The owners of the tunnel were driving an excavation into the territory of the Logan.

The Court says :

"Complainant alleges that he has discovered *good ore* in his *Logan location*, and that respondents intend to assert title *to it* whenever they can reach it through and by means of their tunnel."

The Court also says :

"It appears that the tunnel is being driven by respondents for the purpose of discovering lodes in the line thereof, and that they intend to assert title to such as may be discovered in the tunnel, under the Act of Congress, *within complainant's location*, and elsewhere."

And the only question presented was,

"Whether this may be done as against a valid location on the surface of *earlier date* than the tunnel location?"

Counsel for appellant probably relies upon certain expressions used in the decision, as, for example, "During the lawful occupancy and enjoyment of the locator or owner, who shall obtain from the government a patent, nothing can be done within the claim which shall be or become the *basis* of another location. *Gwillim vs. Donnellan.*"

The "basis" of a location is its *discovery* made on unappropriated public domain. The lines that mark the surface limits of the claim are not the basis of location, but they are the means by which the extent and direction of the claim are marked for underground as well as surface purposes, and they are laid after the "basis" is fixed. It is the point of *discovery* which is the basis of a location. In the Stratton case, this discovery on the part of the tunnel claimants had not been made. They were hunting for such a basis, and in doing so were going into the appropriated land of another whose rights were senior to the tunnel. Certainly there is nothing in this that relates to the question at bar, where the Last Chance discovery is a valid one, and the question is as to the extralateral ownership on the vein, on the apex of which the Last Chance was located on unappropriated public domain.

So, again, in the Stratton case, the Court says:

"Section 2322 provides that the locators of claims, pursuant to Section 2320, shall have the exclusive right of possession and enjoyment of the

surface, and of all veins throughout their entire depth the tops or apexes of which lie inside their surface lines, which includes all ore within the claim, *excepting such as may outcrop in adjacent territory and pass with other locations.*"

In the case at bar the ore in controversy does not outcrop within the Del Monte, but does outcrop in adjacent territory, and, as we contend, passed with the location of the Last Chance claim; and the Del Monte, therefore, had no claim to this ore so outcropping in adjacent territory.

In the Stratton case, the whole decision went upon the assumption that the respondents, by virtue of the junior tunnel location, proposed to take ores from the senior lode location.

The Court says :

"So long as respondents assert the *right* to *take the ores of the Logan location*, through and by means of their tunnel, they cannot be heard to say that they have not such intention, but their purpose is to go beyond in search of greener fields and pastures new."

It would seem that the counsel for appellant, in citing the Stratton case as an authority, still adhere to the misconception of this case which was suggested in our supplemental brief, to wit : that the junior location (the Last Chance) in some way invades the possession of the senior location (the New York), and that it is only by virtue of such invasion of a senior claim that extralateral rights are obtained as against the appellant (Del Monte).

In the case at bar, the decision of the rights of the parties, in the first place, does not involve any element of conflict between the New York and the Last Chance. The Last Chance claims as against

the Del Monte only so much, in longitudinal extent, of the Last Chance vein under Del Monte surface as it has longitudinal extent of apex within the surface of which it is the exclusive owner.

As to the question, however, asked by the Circuit Court of Appeals, as to whether the lines of a junior location may be laid within the surface boundaries of a senior location, for the purpose of securing to the junior location extralateral rights *not in conflict* with any rights of a senior location, we suggest that this Stratton case holds, that even the blasting of a hole in the solid granite of the mountain, not in itself amounting to taking of ore, or anything of value, will not be enjoined; and the intimation is very plain that the amount of damages in such a case would be nominal. How much more is that true as to the laying of surface survey lines over the property of a senior proprietor, such lines occupying no breadth or thickness, and in no way affecting the possession or right of the senior claimant? As to this question, asked by the Court of Appeals, there is certainly nothing in the Stratton case which, in the slightest degree, militates against our contention, that where there are two overlapping lode mining claims, located on the same vein, the senior claim has its entire section of the lode, both on the surface and under ground, and the junior location has its entire section of the lode, both on the surface and under ground, *except* that portion thereof which had been granted to the senior claimant, and that this exclusion, according to the relation of course and dip of vein to the vertical planes drawn through end-lines,

may be greater underground than on the surface, or, on the other hand, may be greater on the surface than underground; but where the two locations are made upon the same vein, which has a curved line of apex, and the dip of the vein is on the convex side of that curved line of apex, the effect of the exclusion may leave to the junior claimant a greater extent underground than at the surface, although at no depth can his longitudinal extent exceed "1,500 feet in length along the vein or lode."

Revised Stats. U. S., Section 2320.

We respectfully submit that the Stratton case does not, in the slightest degree, militate against any of the contentions urged by the appellee in the briefs or upon the oral argument in this cause.

EDWARD O. WOLCOTT,
JOEL F. VAILE,
Solicitors for Appellee.

Syllabus.

It passes the second question, viz.: "2. Does the patent of the Last Chance Lode mining claim, which first describes the rectangular claim by metes and bounds and then excepts and excludes them from the premises previously granted to the New York Lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim?" because it needs no other answer than that which is contained in the discussion of the first question in its opinion.

To the third question, viz.: "3. Is the easterly side of the New York Lode mining claim and 'end line' of the Last Chance Lode mining claim within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?" it gives a negative answer.

The fourth question, viz.: "4. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?" it answers in the affirmative.

It holds that the fifth question, viz.: "5. On the facts presented by the record herein has the appellee the right to follow its vein downward beyond its west side line and under the surface of the premises of appellant?" in effect seeks from this court a decision of the whole case, and therefore is not one which it is called upon to answer.

In discussing the first of these questions the court holds:

(1) That it is dealing with statutory rights, and may not go beyond the terms of the statutes;

(2) That as Congress has prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his own territory;

(3) That the Government does not grant the right to search for minerals in lands which are the private property of individuals, or authorize any disturbance of the title or possession of such lands;

(4) That the location of a mining claim means the giving notice of that claim: that it need not follow the lines of Government surveys: that it is made to measure rights beneath the surface: and that although the statute requires it to be distinctly marked on the surface, the doing so does not prevent a subsequent location by another party upon the same, or a part of the same territory, as, in such case, the statute provides a way for determining the respective rights of the parties:

(5) That the requisition in the statute that the end lines of the location should be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location might exercise.

(6) That the answer to the first question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires.

In discussing the fourth of these propositions the court says: "Our conclu-

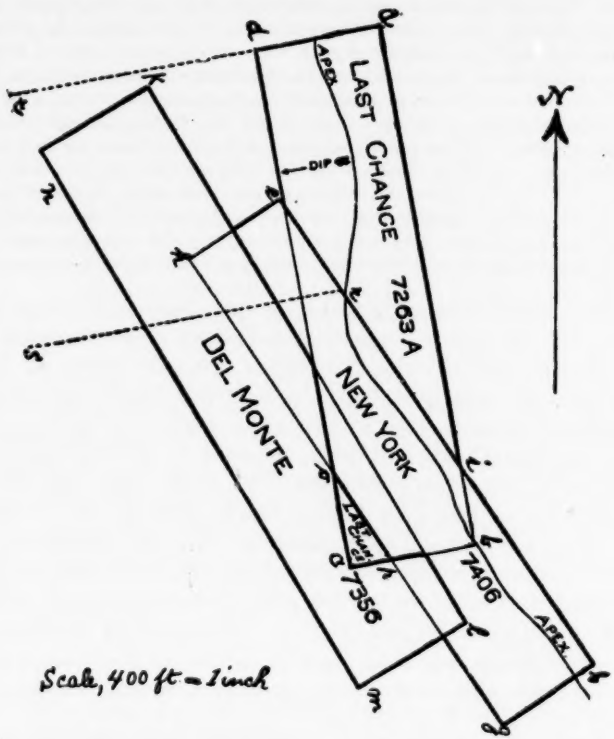
Statement of the Case.

sions may be summed up in these propositions: *First*, the location as made on the surface by the locator determines the extent of rights below the surface. *Second*, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. *Third*, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. *Fourth*, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location.

THIS case is before this court on questions certified by the Court of Appeals for the Eighth Circuit. The facts stated are as follows: The appellant is the owner in fee of the Del Monte Lode mining claim, located in the Sunnyside mining district, Mineral County, Colorado, for which it holds a patent bearing date February 3, 1894, pursuant to an entry made at the local land office on February 27, 1893. The appellee is the owner of the Last Chance Lode mining claim, under patent dated July 5, 1894, based on an entry of March 1, 1894. The New York Lode mining claim, which is not owned by either of the parties, was patented on April 5, 1894, upon an entry of August 26, 1893. The relative situation of these claims, as well as the course and dip of the vein, which is the subject of controversy, is shown in the diagram on page 58.

Both in location and patent the Del Monte claim is first in time, the New York second and the Last Chance third. When the owners of the Last Chance claim applied for their patent proceedings in adverse were instituted against them by the owners of the New York claim, and an action in support of such adverse was brought in the United States Circuit Court for the District of Colorado. This action terminated

in favor of the owners of the New York and against the owners of the Last Chance, and awarded the territory in conflict between the two locations to the New York claim. The ground in conflict between the New York and Del Monte, except so much thereof as was also in conflict between the



Del Monte and Last Chance locations, is included in the patent to the Del Monte claim. The New York secured a patent to all its territory, except that in conflict with the Del Monte, and the Last Chance in turn secured a patent to all of its territory, except that in conflict with the New York, in which last-named patent was included the triangular sur-

face conflict between the Del Monte and Last Chance, which, by agreement, was patented to the latter. The Last Chance claim was located upon a vein, lode or ledge of silver and lead bearing ore, which crosses its north end line and continues southerly from that point through the Last Chance location until it reaches the eastern side line of the New York, into which latter territory it enters, continuing thence southerly with a southeasterly course on the New York claim until it crosses its south end line. No part of the apex of the vein is embraced within the small triangular parcel of ground in the southwest corner of the Last Chance location which was patented to the Last Chance as aforesaid, and no part of the apex is within the surface boundaries of the Del Monte mining claim. The portion of the vein in controversy is that lying under the surface of the Del Monte claim and between two vertical planes, one drawn through the north end line of the Last Chance claim extending westerly, and the other parallel thereto and starting at the point where the vein leaves the Last Chance and enters the New York claim, as shown on the foregoing diagram. Upon these facts the following questions have been certified to us:

"1. May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location under-ground or extralateral rights not in conflict with any rights of the senior location?

"2. Does the patent of the Last Chance Lode mining claim, which first describes the rectangular claim by metes and bounds and then excepts and excludes therefrom the premises previously granted to the New York Lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim?

"3. Is the easterly side of the New York Lode mining claim an 'end line' of the Last Chance Lode mining claim within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?

DEL MONTE MINING AND MILLING COMPANY *v.* LAST CHANCE MINING AND MILLING COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 147. Argued December 8, 9, 1897. — Decided May 23, 1898.

To the first question certified by the Circuit Court of Appeals, viz.: "1. May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location under-ground or extralateral rights not in conflict with any rights of the senior location?" this court returns an affirmative answer, subject to the qualification that no forcible entry is made.

"4. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?

"5. On the facts presented by the record herein has the appellee the right to follow its vein downward beyond its west side line and under the surface of the premises of appellant?"

Mr. Charles S. Thomas for Del Monte Mining & Milling Company. *Mr. William H. Bryant* and *Mr. Harry H. Lee* were on his brief.

Mr. Joel F. Vaile for Last Chance Mining & Milling Company. *Mr. Edward O. Wolcott* was on his brief.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The questions thus presented are not only important but difficult, involving as they do the construction of the statutes of the United States in respect to mining claims. As leading up to a clearer understanding of those statutes it may be well to notice the law in existence prior thereto. The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the States and Territories of the United States, and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface. Unquestionably at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface, but the possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath. It is said by Lindley, in his work on Mines, (vol. 1, sec. 4,) that in certain parts of England and Wales so called

local customs were recognized which modified the general rule of the common law, but the existence of such exceptions founded upon such local customs only accentuates the general rule. The Spanish and Mexican mining law confined the owner of a mine to perpendicular lines on every side. *Mining Company* v. *Tarbet*, 98 U. S. 463, 468; 1 Lindley on Mines, sec. 13. The peculiarities of the Mexican law are discussed by Lindley at some length in the section referred to. It is enough here to notice the fact that by the Mexican as by the common law the surface rights limited the rights below the surface.

In the acquisition of foreign territory since the establishment of this government the great body of the land acquired became the property of the United States, and is known as their "public lands." By virtue of this ownership of the soil the title to all mines and minerals beneath the surface was also vested in the Government. For nearly a century there was practically no legislation on the part of Congress for the disposal of mines or mineral lands. The statute of July 26, 1866, c. 262, 14 Stat. 251, was the first general statute providing for the conveyance of mines or minerals. Previous to that time it is true that there had been legislation respecting leases of mines, as, for instance, the act of March 3, 1807, c. 49, § 5, 2 Stat. 448, 449, which authorized the President to lease any lead mine in the Indiana Territory for a term not exceeding five years; and acts providing for the sale of lands containing lead mines in special districts, act of March 3, 1829, c. 55, 4 Stat. 364; act of July 11, 1846, c. 36, 9 Stat. 37; act of March 1, 1847, c. 32, 9 Stat. 146; act of March 3, 1847, c. 54, 9 Stat. 179; also such legislation as is found in the act of February 27, 1865, c. 64, 13 Stat. 440, providing for a District and Circuit Court for the District of Nevada, in which it was said, in section 9: "That no possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of posses-

sion;" that of May 5, 1866, c. 73, 14 Stat. 43, concerning the boundaries of the State of Nevada, which provided that "all possessory rights acquired by citizens of the United States to mining claims, discovered, located and originally recorded in compliance with the rules and regulations adopted by miners in the Pah-Ranagat and other mining districts in the territory incorporated by the provisions of this act into the State of Nevada shall remain as valid subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining States and Territories;" and the act of July 25, 1866, c. 244, 14 Stat. 242, which, granting to A. Sutro and his assigns certain privileges to aid in the construction of a tunnel, conferred upon the grantees the right of preëmption of lodes within two thousand feet on each side of said tunnel. Two laws were also passed regulating the sale and disposal of coal lands; one on July 1, 1864, c. 205, and one on March 3, 1865, c. 107, 13 Stat. 343, 529.

Notwithstanding that there was no general legislation on the part of Congress, the fact of explorers searching the public domain for mines, and their possessory rights to the mines by them discovered, was generally recognized, and the rules and customs of miners in any particular district were enforced as valid. As said by this court in *Sparrow* v. *Strong*, 3 Wall. 97, 104: "We know, also, that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the National Government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." See also *Forbes* v. *Gracey*, 94 U. S. 762; *Jennison* v. *Kirk*, 98 U. S. 453, 459; *Broder* v. *Water Company*, 101 U. S. 274, 276; *Manuel* v. *Wulff*, 152 U. S. 505, 510; *Black* v. *Elkhorn Mining Company*, 163 U. S. 445, 449.

The act of 1866 was, however, as we have said, the first

general legislation in respect to the disposal of mines. The first section provided: "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The second section gave to a claimant of a vein or lode of quartz, or other rock in place, bearing gold, etc., the right "to file in the local land office a diagram of the same . . . and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." The purpose here manifested was the conveyance of the vein, and not the conveyance of a certain area of land within which was a vein. Section 3, which set forth the steps necessary to be taken to secure a patent and required the payment of five dollars per acre for the land conveyed, added: "But said plat, survey or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued." Nowhere was there any express limitation as to the amount of land to be conveyed, the provision in section 4 being: "That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons." Obviously the statute contemplated the patenting of a certain

number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area or the form of the surface location, leaving the Land Department in each particular case to grant so much of the surface as was "fixed by local rules," or was in the absence of such rules in its judgment necessary for the convenient working of the mine. The party to whom the vein was thus patented was permitted to follow it on its dip to any extent, although thereby passing underneath lands to which the owner of the vein had no title.

As might be expected, the patents issued under this statute described surface areas very different and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight or in a curved or irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area. Even under this statute, although its express purpose was primarily to grant the single vein, yet the rights of the patentee beneath the surface were limited and controlled by his rights upon the surface. If, in fact, as shown by subsequent explorations, the vein on its course or strike departed from the boundary lines of the surface location, the point of departure was the limit of right. In other words, he was not entitled to the claimed and patented number of feet of the vein, irrespective of the question whether the vein in its course departed from the lines of the surface location.

The litigation in respect to the Flagstaff mine in Utah illustrates this. There was a local custom giving to the locator of a mine fifty feet in width on either side of the course of the vein, and the Flagstaff patent granted a super-

ficies one hundred feet wide by twenty-six hundred feet long, with the right to follow the vein described therein to the extent of twenty-six hundred feet. It turned out that the vein, instead of running through this parallelogram lengthwise, crossed the side lines, so that there was really but a hundred feet of the length of the vein within the surface area. On either side of the Flagstaff ground were other locations, through which the vein on its course passed. As against these two locations the owners of the Flagstaff claimed the right to follow the vein on its course or strike to the full extent of twenty-six hundred feet. This was denied by the Supreme Court of Utah. *McCormick* v. *Varnes*, 2 Utah, 355. In that case the controversy was with the location on the west of the Flagstaff. The decision of that court in respect to the controversy with the location on the east of the Flagstaff is not reported, but the case came to this court. *Mining Company* v. *Tarbet*, 98 U. S. 463. In the course of the opinion (pages 467, 468) it was said:

"It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to."

These decisions show that while the express purpose of the statute was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent. This act of 1866 remained in force only six years, and was then superseded by the act of May 10, 1872, c. 152, 17 Stat. 91, found in the Revised Statutes, sections 2319 and following. This is the statute which is in force to-day, and under which the con-

troversies in this case arise. Section 2319, Revised Statutes, (corresponding to section 1 of the act of 1872,) reads:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the law of the United States."

It needs no argument to show that if this were the only section bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We therefore turn to the following sections to see what extralateral rights are given and upon what conditions they may be exercised. And it must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity and rule that by reason of such equity a party may follow a vein into the territory of his neighbor, and appropriate it to his own use. If cases arise for which Congress has made no provision, the courts cannot supply the defect. Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions or else be content with simply the mineral beneath the surface of his territory. It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along

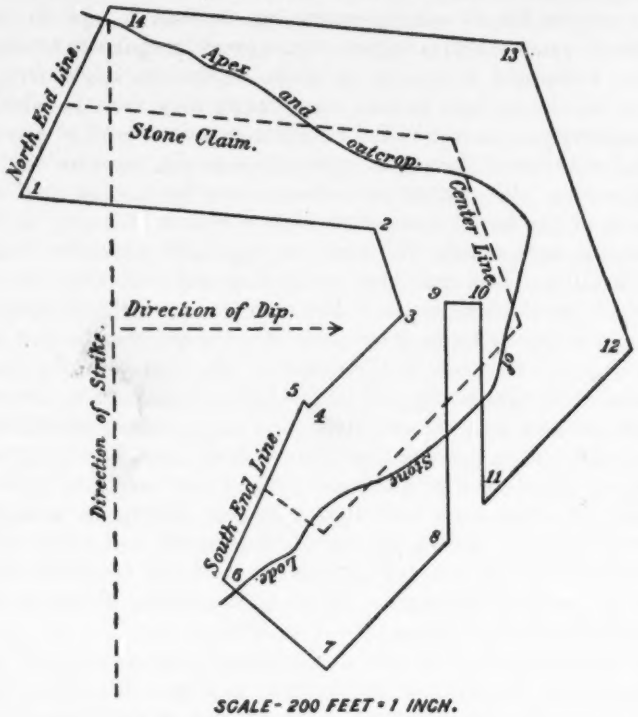
its course or strike, a right to follow that vein on its dip for the same length ought to be awarded to him if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level and veins constantly pursued a straight line there would be little difficulty in legislation to provide for all contingencies, but mineral is apt to be found in mountainous regions where great irregularity of surface exists and the course or strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive. We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and if so it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not, what is equity, but what saith the statute. Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. (Sec. 2320.) It is not within the province of the courts to ignore such provision and hold that a locator, failing to comply with its terms, has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged. *Iron Silver Mining Company* v. *Elgin Mining Company*, 118 U. S. 196.

This case, which is often called the "Horseshoe case," on account of the form of the location, is instructive. The diagram on page 68, which was in the record in that case, illustrates the scope of the decision.

The locator claimed in his application for a patent the lines 1, 14 and 5, 6, as the end lines of his location, and because of their parallelism, that he had complied with the letter of the statute, but the court ruled against him, saying in the opinion (page 208):

"The exterior lines of the Stone claim formed a curved

figure somewhat in the shape of a horseshoe, and its end lines are not and cannot be made parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line. The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure,



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and apparently for no other reason than their parallelism called them end lines.

"We are, therefore, of opinion that the objection that, by reason of the surface form of the Stone claim, the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof."

It is true the court also observed that if the two lines named by the locator were to be considered the end lines, no part of the vein in controversy fell "within vertical planes drawn down through those lines, continued in their own direction." But notwithstanding this observation the point of the decision was that the lines, which were the end lines of the location as made on the surface of the ground, were not parallel, and that this defect could not be obviated by calling that which was in fact a side line an end line. This is made more clear by the observations of the Chief Justice, who, with Mr. Justice Bradley, dissented, in which he said:

"I cannot agree to this judgment. In my opinion the end lines of a mining location are to be projected parallel to each other and crosswise of the general course of the vein within the surface limits of the location, and whenever the top or apex of the vein is found within the surface lines extended vertically downwards, the vein may be followed outside of the vertical side lines. The end lines are not necessarily those which are marked on the map as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface."

In other words, the court took the location as made on the surface by the locator, determined from that what were the end lines, and made those surface end lines controlling upon his rights; and rejected the contention that it was proper for the court to ignore the surface location and create for the locator a new location whose end lines should be crosswise of the general course of the vein as finally determined by explorations. That this decision and that in the *Tarbet case*, *supra*, were correct expositions of the statute and correctly comprehended the intent of Congress therein, is evident from the fact that, although they were announced in 1885 and 1878, respectively, Congress has not seen fit to change the language of the statute, or in any manner to indicate that any different measure of rights should be awarded to a mining locator.

With these preliminary observations we pass to a consideration of the questions propounded. The first is:

"May any of the lines of a junior lode location be laid

within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?"

By section 2319, quoted above, the mineral deposits which are declared to be open to exploration and purchase are those found in lands belonging to the United States, and such lands are the only ones open to occupation and purchase. While this is true, it is also true that until the legal title has passed the public lands are within the jurisdiction of the Land Department, and although equitable rights may be established Congress retains a certain measure of control. *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589. The grant is, as is often said, in process of administration. Passing to section 2320, beyond the recognition of the governing force of customs and regulations and a declaration as to the extreme length and width of a mining claim, it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. . . . The end lines of each claim shall be parallel to each other."

Section 2322 gives to the locators of all mining locations, so long as they comply with laws of the United States, and with state, territorial and local regulations not in conflict therewith, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor

of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Section 2324 in terms authorizes "the miners of each mining district to make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 provides for the issue of a patent. It reads:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of

land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter

no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 is as follows:

"Where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein con-

tained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

These are the only provisions of the statute which bear upon the question presented.

The stress of the argument in favor of a negative answer to this question lies in the contention that by the terms of the statute exclusive possessory rights are granted to the locator. Section 2322 declares that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location," and negatively that "nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Hence, it is said that affirmatively and negatively it is provided that the locator shall have exclusive possession of the surface, and that no one shall have a right to disturb him in such possession. How then, it is asked, can any one have a right to enter upon such location for the purpose of making a second location. If he does so he is a trespasser, and it cannot be presumed that Congress intended that any rights should be created by trespass.

We are not disposed to undervalue the force of this argument, and yet are constrained to hold that it is not controlling. It must be borne in mind that the location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called in section 2320 and elsewhere a "claim" or a "mining claim." Indeed, the words "claim" and "location" are used interchangeably. This location does not come at the end of the proceedings, to define that which has been acquired after all contests have been adjudicated. The location, the mere making of a claim, works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other and include the same ground, for then the right of possession becomes a matter of dispute, but no location creates a right superior

to any previous valid location. And these possessory rights have always been recognized and disputes concerning them settled in the courts.

It will also be noticed that the locator is not compelled to follow the lines of the Government surveys, or to make his location in any manner correspond to such surveys. The location may, indeed, antedate the public surveys, but whether before or after them, the locator places his location where, in his judgment, it will cover the underlying vein. The law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein and the discoverer desire to take the entire surface and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators.

Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced vein, as is possible.

Further, Congress has not prescribed how the location shall be made. It has simply provided that it "must be distinctly marked on the ground so that its boundaries can be readily traced," leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such location shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes shall be placed along the sides and ends of the location, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground, are

not always made by experienced surveyors. Indeed, as a rule, it has been and was to be expected that such locations and markings would be made by the miners themselves — men inexperienced in the matter of surveying, and so in the nature of things there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities the posts, stakes or other particular marks required by the rules and regulations of the mining district may be placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken, such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of the existence of any prior claim. And in all places posts, stakes or other monuments, although sufficient at first and clearly visible, may be destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered naturally many locators hurry to seek by early locations to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that around any new discovery there quickly grows up what is called a mining camp, and the contiguous territory is prospected and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made, and, indeed, in every mining camp where large discoveries have been made locations, in fact, overlap each other again and again. *McEvoy* v. *Hyman*, 25 Fed. Rep. 596, 600. This confusion and conflict is something which must have been expected, foreseen — something which in the nature of things would happen, and the legislation of Congress must be interpreted in the light of such foreseen contingencies.

Still again, while a location is required by the statute to be plainly marked on the surface of the ground, it is also provided in section 2324 that, upon a failure to comply with certain named conditions, the claim or mine shall be open to reloca-

tion. Now, although a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon. The statute does not provide, and it cannot be contemplated, that he is to wait until by judicial proceedings it has become established that the prior location is invalid or has failed before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location.

Congress has in terms provided for the settlement of disputes and conflicts, for by section 2325, when a locator makes application for a patent, (thus seeking to have a final determination by the Land Department of his title,) he is required to make publication and give notice so as to enable any one disputing his claim to the entire ground within his location to know what he is seeking, and any party disputing his right to all or any part of the location may institute adverse proceedings. Then by section 2326 proceedings are to be commenced in some appropriate court, and the decision of that court determines the relative rights of the parties. And the party who by that judgment is shown to be "entitled to the possession of the claim, or any portion thereof," may present a certified copy of the judgment roll to the proper land officers and obtain a patent "for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightfully possess." And that the claim may be found to belong to different persons and that the right of each to a portion may be adjudicated is shown by a subsequent sentence in that same section, which provides that "if it appears from a decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim . . . and patents shall issue to the several parties according to their respective rights." So it distinctly appears that notwithstanding the provision in reference to the rights of the locators to the possession of the surface ground within their locations, it was perceived that

locations would overlap, that conflicts would arise, and a method is provided for the adjustment of such disputes. And this, too, it must be borne in mind is a statutory provision for the final determination, and is supplementary to that right to enforce temporary possession, which, in accordance with the rules and regulations of mining districts, has always been recognized.

This question is not foreclosed by any decisions of this court as suggested by counsel. It is true there is language in some opinions which, standing alone, seems to sustain the contention. Thus, in *Belk* v. *Meagher*, 104 U. S. 279, 284, it is said:

"Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

And again, in *Gwillim* v. *Donnellan*, 115 U. S. 45, 49:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second."

The question presented in each of those cases was whether a second location is effectual to appropriate territory covered by a prior subsisting and valid location, and it was held it is

not. Of the correctness of those decisions there can be no doubt. A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location. But that is not the question here presented. Indeed, the form in which it is put excludes any impairment or disturbance of the substantial rights of the prior locator. The question is whether the lines of a junior lode location may be laid upon a valid senior location for the purpose of defining or securing "underground or extralateral rights not in conflict with any rights of the senior location." In other words, in order to comply with the statute, which requires that the end lines of a claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, may a junior locator place an end line within the limits of a prior location?

In that aspect of the question the decisions referred to, although the language employed is general and broad, do not sustain the contention of counsel. This distinction is recognized in the text books. Thus in 1 Lindley on Mines, section 363, the author says:

"As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent. Many of them arise from honest mistake, others from premeditated design. In both instances the question of priority of appropriation is the controlling element which determines the rights of the parties. Two locations cannot legally occupy the same space at the same time. These conflicts sometimes involve a segment of the same vein, on its strike; at others, they involve the dip-bounding planes underneath the surface. More frequently, however, they pertain to mere overlapping surfaces. The

same principles of law apply with equal force to all classes of cases. Such property rights as are conferred by a valid prior location, so long as such location remains valid and subsisting, are preserved from invasion, and cannot be infringed or impaired by subsequent locators. To the extent, therefore, that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void."

It will be seen that while the author denies the right of a second locator to enter upon the ground segregated by the first location, he recognizes the fact that overlapping locations are frequent, and declares the invalidity of the second location so far as it affects the rights vested in the prior locator, and in that he follows the cases from which we have quoted.

The practice of the Land Department has been in harmony with this view. The patents which were issued in this case for the Last Chance and New York claims give the entire boundaries of the original locations, and except from the grant those portions included within prior valid locations. So that on the face of each patent appears the original survey with the parallel end lines, the territory granted and the territory excluded. The instructions from the Land Department to the surveyors general have been generally in harmony with this thought. Thus, in a letter from the Commissioner of the Land Office to the surveyor general of Colorado, of date November 5, 1874, reported in 1 Copp's Land Owner, p. 133, are these instructions:

"In this connection I would state that the surveyor general has no jurisdiction in the matter of deciding the respective rights of parties in cases of conflicting claims.

"Each applicant for a survey under the mining act is entitled to a survey of the entire mining claim, as *located*, if held by him in accordance with the local laws and Congressional enactments.

"If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plat and field notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the distances from the

established corners at which the exterior boundaries of the respective surveys intersect each other."

Again, in a general circular issued by the Land Department on November 16, 1882, found in 9 Copp's Land Owner, p. 162, it is said:

"The regulations of this office require that the plats and field notes of surveys of mining claims shall disclose all conflicts between such surveys and prior surveys, giving the areas of conflicts.

"The rule has not been properly observed in all cases. Your attention is invited to the following particulars, which should be observed in the survey of every mining claim:

"1. The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

"2. The intersections of the lines of the survey, with the lines of conflicting prior surveys, should be noted in the field notes and represented upon the plat.

"3. Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

"4. The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows."

Again, on August 2, 1883, in a letter from the Acting Commissioner to the surveyor general of Arizona, reported in 10 Copp's Land Owner, p. 240, it is said:

"You state, and it is shown to be so by said diagram, that the said Grand Dipper lode, so located, is a four-sided figure with parallel end lines, the provisions of section 2320, U. S. Revised Statutes being fully complied with.

"The survey of the claim made by the deputy surveyor cuts off a portion of the right end, shown to be in conflict with the Emerald lode, the easterly end line of the Emerald claim thus becoming one of the boundary lines of the said 'Grand Dipper,' and not parallel to the easterly end line of the Grand Dipper survey.

"I cannot see how you can give your approval to such survey. No reason exists why the survey lines should not con-

form directly to the lines of the location, they being properly run in the first instance."

It is true that on December 4, 1884, a circular letter was issued by the Land Department which slightly qualifies the general instructions previously issued. So that it may, perhaps, be truthfully said that the practice of the Land Department has not been absolutely uniform, and yet the descriptions which are found in the patents before us show that notwithstanding the circular of 1884 the former practice still obtains.

It may be said that the statute gives to the first locator the right of exclusive possession; that an entry upon that territory with a view of making a subsequent location and marking on the ground its end and side lines is a trespass, and that to justify such an entry is to sanction a forcible trespass, and thus precipitate a breach of the peace. But no such conclusion necessarily follows. The case of *Atherton* v. *Fowler*, 96 U. S. 513, illustrates this. It appeared that one Page was in lawful possession of certain premises claimed under a Mexican grant, though his title had not been confirmed by any act of Congress; that while so in possession a party, of persons who had no interest or claim to any part of the land, invaded it by force, tore down the fences, dispossessed those who occupied, and built on and cultivated parts of it under pretence of establishing a right of preëmption to the several parts which they had so seized. It was held that such forcible seizure of the premises gave no rights under the preëmption law, and it was said (p. 516):

"It is not to be presumed that Congress intended, in the remote regions where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders. In parts of the country where these preëmptions are usually made, the protection of the law to rights of person and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that Congress has extended a standing invitation to the strong, the daring and the unscrupulous to dispossess by

force the weak and the timid from actual improvements on the public lands, in order that the intentional trespasser may secure by these means the preferred right to buy the land of the Government when it comes into market."

But while thus declaring that it cannot be presumed that Congress countenanced any such forcible seizure of premises, the court also observed (p. 516):

"Undoubtedly there have been cases, and may be cases again, where two persons making settlement on different parts of the same quarter section of land may present conflicting claims to the right of preëmption of the whole quarter section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter section is open, unenclosed, and neither party interferes with the actual possession of the other. In such cases, the settlement of the latter of the two may be *bona fide* for many reasons. The first party may not have the qualifications necessary to a preemptor, or he may have preëmpted other land, or he may have permitted the time for filing his declaration to elapse, in which case the statute expressly declares that another person may become preëmptor, or it may not be known that the settlements are on the same quarter."

The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, unenclosed and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain and where the validity of apparent locations is unsettled and doubtful. Under those circumstances it is not strange — on the contrary it is something to be expected and, as we have seen, is a common experience — that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as to veins

beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must — when it appears that his lines are to any extent upon territory covered by a prior valid location — go through the form of making a relocation simply works delay and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines.

In this connection it may be properly inquired what is the significance of parallel end lines? Is it to secure to the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be like the ordinary public surveys in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked a feature of the range, township and section system? Clearly not. While the contemplation of Congress may have been that every location should be in the form of a parallelogram, not exceeding 1500 by 600 feet in size, yet the purpose also was to permit the location in such a way as to secure not exceeding 1500 feet of the length of a discovered vein, and it was expected that the locator would so place it as in his judgment would make the location lengthwise cover the course of vein. There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downwards outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are

bounded by the several lines of his location, and the end lines must be parallel in order that going downwards he shall acquire no further length of the vein than the planes of those lines extended downward enclose. If the end lines are not parallel, then, following their planes downward his rights will be either converging and diminishing or diverging and increasing the farther he descends into the earth. In view of this purpose and effect of the parallel end lines it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or underground rights.

For these reasons, therefore, we are of opinion that the first question must be answered in the affirmative.

It may be observed in passing that the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. In other words, referring to the first diagram, the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line *r s*, even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line *e h*, the end line of the New York claim, extended downward into the earth will at a certain distance pass to the south of the line *r s*, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end line of the Last Chance, *b c*, extended vertically into the earth, belongs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line *a d t* and the line *r s*, and to appropriate so much of it as is not held by the prior

location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration.

The second question needs no other answer than that which is contained in the discussion we have given to the first question, and we, therefore, pass it.

The third question is also practically answered by the same considerations, and in the view we have taken of the statutes the easterly side of the New York lode mining claim is not the end line of the Last Chance lode mining claim.

The fourth question presents a matter of importance, particularly in view of the inferences which have been drawn by some trial courts, state and national, from the decisions of this court. That question is—

"If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?"

The decisions to which we refer are *Mining Company* v. *Tarbet*, 98 U. S. 463; *Iron Silver Mining Company* v. *Elgin Mining Company*, 118 U. S. 196; *Argentine Mining Company* v. *Terrible Mining Company*, 122 U. S. 478; *King* v. *Amy &c. Mining Company*, 152 U. S. 222.

Two of these cases have been already noticed in this opinion. In *Mining Company* v. *Tarbet* a surface location, 2600 feet long and 100 feet wide had been made. This location was so made on the supposition that it followed lengthwise the course of the vein, and the claim was of the ownership of 2600 feet in length of such vein. Subsequent explorations developed that the course of the vein was at right angles to that which had been supposed, and that it crossed the side lines, so that there was really but 100 feet of the length of the vein within the surface area. It was held that the side lines were to be regarded as the end lines. In *Iron Silver Mining Company* v. *Elgin Mining Company* the location was in the form of a horseshoe. The end lines were not parallel. The location was quite irregular in form, and

inasmuch as one of the side lines was substantially parallel with one of the end lines it was contended that this side line should be considered an end line, and this although the vein did not pass through such side line. But the court refused to recognize any such contention and held that the end lines were those which were in fact end lines of the claim as located, and that as they were not parallel there was no right to follow the vein on its dip beyond the side lines. In *Argentine Mining Company* v. *Terrible Mining Company* the claims of the plaintiff and defendant crossed each other, and in its decision the court affirmed the ruling in *Mining Company* v. *Tarbet*, saying (p. 485):

"When, therefore, a mining claim crosses the course of the lode or vein instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface."

In *King* v. *Amy &c. Mining Company* the prior cases were reaffirmed, and those lines which on the face of the location were apparently side lines were adjudged end lines because the vein on its course passed through them, the location being not along the course of the vein but across it. But in neither of these cases was the question now before us presented or determined. All that can be said to have been settled by them is, first, that the lines of the location as made by the locator are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location; second, that the contemplation of the statute is that the location shall be along the course of the vein, reading, as it does, that a mining claim "may equal, but shall not exceed, 1500 feet in length along the vein or lode;" and, third, that when subsequent explorations disclose that the location has been made not along the course of the vein, but across it, the side lines of the location become in law the end lines. Nothing was said in either of these cases as to how much of the apex of the vein must be found within the surface, or what rule obtains in case the vein crosses only one

end line. So, when *Last Chance Mining Company* v. *Tyler Mining Company*, 157 U. S. 683, 696, was before us, (in which the question here stated was presented but not decided, the case being disposed of on another ground,) we said, after referring to the prior cases, "but there has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a side line."

We pass, therefore, to an examination of the provisions of the statute. Premising that the discoverer of a vein makes the location, that he is entitled to make a location not exceeding 1500 feet in length along the course of such vein and not exceeding "three hundred feet on each side of the middle of the vein at the surface," that a location thus made discloses end and side lines, that he is required to make the end lines parallel, that by such parallel end lines he places limits not merely to the surface area but limits beyond which below the surface he cannot go on the course of the vein, that it must be assumed that he will take all of the length of the vein that he can, we find from section 2322 that he is entitled to "all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, "although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the "right of possession to such

outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end line to end line in order to pursue that vein in its dip outside the vertical side lines. Naming limits, beyond which a grant does not go, is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein, whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines. And this is all that the statute provides. Suppose a vein enters at an end line, but terminates half way across the length of the location, his right to follow that vein on its dip beyond the vertical side lines is as plainly given by the statute as though in its course it had extended to the farther end line. It is a vein, "the top or apex of which lies inside of such surface lines extended downward vertically." And the same is true if it enters at an end and passes out at a side line.

Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein "the top or apex of which lies inside of such surface lines extended downward vertically" becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the

limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. "Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." *Mining Company* v. *Tarbet*, 98 U. S. 463, 468.

These conclusions find support in the following decisions: *Stevens* v. *Williams*, 1 McCrary, 480, 490, in which is given the charge of Mr. Justice Miller to a jury, in the course of which he says: "You must take all the evidence together; you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, and the course it takes; and from all that you are to say what is its general course. The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines, vertically extended, as though they were his end lines, but if he happens to strike out diagonally, as far as his side lines include the apex, so far he can pursue it laterally." *Wakeman* v. *Norton*, decided by the Supreme Court of Colorado, June 1, 1897, 49 Pac. Rep. 283, in which Mr. Justice Goddard, whose opinions, by virtue of his long experience as trial judge in the mining districts of Leadville and Aspen as well as on the supreme bench of the State, are entitled to great consideration, said (p. 286): "In instructing the jury that, in order to give any extralateral rights, it was essential that the apex or top of a vein should

on its course pass through both end lines of a claim, the court imposed a condition that has not heretofore been announced as an essential to the exercise of such right in any of the adjudicated cases." *Fitzgerald* v. *Clark*, 17 Montana, 100, a case now pending in this court on writ of error. *Tyler Mining Company* v. *Last Chance Mining Company*, Court of Appeals, Ninth Circuit, decided by Circuit Judge McKenna, now a Justice of this court, Circuit Judge Gilbert and District Judge Hawley, 7 U. S. App. 463. *Consolidated Wyoming Gold Mining Company* v. *Champion Mining Company*, Circuit Court Northern District California, decided by Hawley, District Judge, 63 Fed. Rep. 540. *Tyler Mining Company* v. *Last Chance Mining Company*, Circuit Court District of Idaho, decided by Beatty, District Judge, who in the course of his opinion pertinently observed: "What reason under the law can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines.' Upon the fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of its location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away, and we take all from the law that is of value to the miner." 71 Fed. Rep. 848, 851. *Carson City Gold and Silver Mining Company* v. *North Star Mining Company*, Circuit Court Northern District of California, decided by Beatty, District Judge, 73 Fed. Rep. 597. *Republican Mining Company* v. *Tyler Mining Company*, Circuit Court of Appeals, Ninth Circuit, decided by Circuit Judges Gilbert and Ross and District Judge Hawley, 48 U. S. App. 213. See also 2 Lindley on Mines, section 591.

The fourth question, therefore, is answered in the affirmative.

The fifth question in effect seeks from this court a decision

of the whole case, and therefore is not one which this court is called upon to answer. *Cross* v. *Evans*, 167 U. S. 60; *Warner* v. *New Orleans*, 167 U. S. 467.

It will, therefore, be certified to the Court of Appeals that the first question is answered in the affirmative, the third in the negative, the fourth in the affirmative. The second and fifth are not answered.